Supreme Court, U.S.
FILED

No. _____

09-855 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

# In The
# Supreme Court Of The United States

Nicole Energy Services, Inc.,
Freddie L. Fulson, President
*Petitioners,*

v.

Larry J. McClatchey Trustee,
U.S.Trustee, Asst Trustee
*Respondents.*

On Petition For A Writ Of Certiorari
To The Sixth Circuit Court of Appeals
of the Southern Division of Ohio

ON PETITION FOR A WRIT OF CERTIORARI

Freddie L. Fulson
P.O. Box 2158
Westerville, Ohio 43081
Telephone: 614-602-9294

## QUESTIONS PRESENTED FOR REVIEW.

Pro Se Party-in-Interest Freddie L. Fulson, President, Shareholder and Security Holder filed a "Notice of Appeal" with the Sixth Circuit Court of Appeal, case number 08-4277 and 09-3366. Both the cases were to be De Nova, but they were denied by the Sixth Circuit Court (Court orders attached) for the following reasons:

> The notice of appeal was dismissed based upon the trustee's motion that the funds had been disbursed to the creditors. The fact is that the funds had not been disbursed to the creditors and as of September 3, 2009, the funds still have not been disbursed to any creditors. The notice of appeal was dismissed under rule 363(m) moot. Is the notice of appeal moot?
>
> The Ninth Circuit Court in case (BAP No. CC-07-1176, PW,LLC V. Clear Channel Outdoor, Inc., V. Nancy Knuffer, Chapter11 trustee) ruled in a similar case that the U. S. Congress did not give the rule 363(m) moot the power in a litigation, but to be applied in " leases and contracts. " Is this law correct.?
>
> The Sixth Circuit Court never De Nova the case. Is it a legal right to have an appeal De Nova.?
>
> The Ninth Circuit and Sixth Circuit are in a conflict over the 363(m) moot rule. Who is correct over the 363moot rule as to litigation vs. leases and contracts?....

The U.S. Supreme Court in the case (Tobb v. Radloff 501 U.S. 157 (1991), quoted the law in a Chapter11 reorganization case, which is what the Nicole Energy Services, Inc, case is about. The bankruptcy Court, trustee and the U.S. Trustee denied Nicole Energy Services, Inc., the right to a Chapter11 reorganization plan for its operation. The Sixth Circuit Court of Appeal by not granting the notice of appeal, and by failing to De Nova, also denied Nicole Energy Services, Inc.,

their right to Chapter11 reorganization of its company?. The U.S. Supreme Court justice stated that a company "does not have to be engaged or be engaged in business to operate under a Chapter11 reorganization plan." What is the law?

The Sixth Circuit Court of Appeals, and the Federal District Court both denied the Nicole Energy Services, Inc., and Freddie L. Fulson its" Due process of the law, and its Civil Rights under the laws of 1866."

Does this Court have right to deny justice to citizens?...

The Sixth Circuit Court never ruled as to whether the Asset Purchase Agreement was "free and Clear" of liens. Nicole Gas Production, Ltd. holds a $ 1, 500,000.00 liens in the form of a UCC is this a legal contract?...

The Columbia Companies filed an involuntary Chapter7 against the debtor, and the Nicole Energy Marketing, Inc., et, al, and Freddie L. Fulson for $ 5 million dollars. The bankruptcy Court never conducted a hearing; in fact it continued the requested hearing until he ruled on the Asset Purchase Agreement. The Asset Purchase Agreement , can it be voided by the U.S. Supreme Court for Fraud, and abuse of discretion by the judge.?

Did the bankruptcy Court "abuse its discretion by not abstaining from hearing the case and not remanding the case back to the State Court for jury trial?

Did the bankruptcy Court abuse its discretion by not conducting a hearing on weather Columbia was a "good faith buyer of the Asset the debtor (litigation).?

The Sixth Circuit Court denied the party in interest a stay pending appeal, because the Court believe the trustee that he had disbursed the funds to the creditors. This was not true. Did the Sixth Circuit abuse its discretion?...

Is the Asset Purchase Agreement a fraud since the buyer is Columbia companies, that filed the lawsuit in State Court and one day before the jury trial filed its involuntary Chapter7 claim in bankruptcy Court.?..

Is Columbia claim a bona fide dispute or a fraud claim?

Is this now a criminal case by the trustee, U.S.Trustee, Asst. Trustee and bankruptcy Court.?

Lastly, can the U.S. Supreme Court issue an Revocation Order based upon Rule 1144 Fraud by the Court.

**LIST OF ALL PARTIES TO PROCEEDINGS, BELOW**

NICOLE ENERGY SERVICES, INC.,
Freddie L. Fulson, President, Petitioners,
P.O. Box 2158
Westerville, Ohio 43086

Larry J. McClatchey Trustee,
65 E. State Street, Suite 1800
Kegler, Brown, Hill & Ritter, LLC
Columbus, Ohio 43215

U.S.Trustee, Asst Trustee, Respondents,
175 N. High St. Room 200
Columbus, Ohio 43215

Solicitor General of the United States, Room 5614
Department of Justice
950 Pennsylvania Ave,N.W.
Washington, D.C. 20530-0001

## TABLE OF CONTENTS

Questions Presented for Review ..... i-ii
List of All Parties to Proceedings Below ..... iii
Table of Contents ..... iv
Table of Authorities ..... v
Citation of Opinions Below ..... 1
Statement of Jurisdiction ..... 2
Federal Rule of Civil Procedure Involved ..... 2
Statement of the Case ..... 3
Reasons for Granting Writ ..... 4
Introduction ..... 5
Factual Background ..... 8
Conclusion and Prayer for Relief ..... 27

## INDEX TO APPENDICES

APPENDIX A Decision of Sixth Circuit Court of Appeals April 14, 2009 case# 093366) ..... App. 1
Sixth Circuit Court has ruled upon motion for reconsideration filed April 10, 2009; Order dated September 1, 2009 was denied, signed by the Leonard Green, Clerk

APPENDIX B Decision of the Sixth Circuit Court of Appeals ( case # 08-4277) has ruled upon motion for reconsideration filed May 15, 2009, signed by Leonard Green, Clerk ..... App 2

APPENDIX C Decision of U.S. District Court, Denied Order issued on March 4, 2009; signed by Judge Algernon L. Marbley. Decision on denial of reconsideration was issued on August 3, 2009 and signed by Judge Algenon L. Marbley ( case # 08-0463) ..... App. 3

APPENDIX D Decision of The State Court of Common Pleas, Partial-Summary Judgment, issued January 17, 2007 by Judge Guy L. Reece II ( case # 01-CVH-06-5390).....App. 4

APPENDIX E Decision of the Bankruptcy Court on Confirmation of Liquidation of NES hearing, a copy of Court transcript ( case # 03-67484). The trustee committed perjury by admitting that creditors were waiting for funds. The trustee had filed a motion to dismiss the appeal with the District Court and the Sixth Circuit Court he had disbursed the funds to the creditors and the appeal was moot under the 363(m) rule. This was perjury on the Court. Judge Hoffman granted the confirmation, the transcript signed by Tri-County Janet Atkins on ..... September 18, 2009.....App. 5

## TABLE OF AUTHORITIES

Rule for FBRP:
Chapter11 Reorganization Page 9019.....9 &12
Rule Federal Rule for Civil Procedure 9(b).....10
11 U.S.C. § 303(b) "Bona fide Laws" .....19
28 U.S.C. § 1334.....14
28 U.S.C. § 1452.....14
Federal Energy Regulatory Commission .....4
Champerty Law of Ohio.....9
Fifth Amendment.....4
Rule 1104.....18
U.S. Senate Report No. 95-989 Subsection (a).....4

## CITATION OF OPINIONS BELOW

Appendix 1: The opinion of the United States Court of Appeals appears at Appendix A, order on reconsideration was denied, the order was issued on September 1, 2009 and signed by Leonard Green, Office of Clerk, 540 Potter Stewart, U.S. Courthouse, 100 E. Fifth Street, Cincinnati, Ohio 45202-3988, 513-564-7000. The order is unpublished. ( case # 09-3366).

Appendix 2: The opinion of the United States Court of Appeals appears at Appendix B, order denial on reconsideration was issued on March 30, 2009, and signed by Leonard Green, Office of Clerk, 540 Potter Stewart, U.S. Courthouse, 100 E. Fifth Street, Cincinnati, Ohio 45202-3988, 513-564-7000; ( case # 08-4277). The order is unpublished.

Appendix 3: The opinion of the U.S. District Court in Ohio appears at Appendix C , order of denial of reconsideration was issued on August 3, 2009 ( case # 08-0463) and signed by Judge Algenon L. Marbley, U.S. District Court, 85 Marconi Blvd., Room 319, Columbus, Ohio 43215, 614-719-3260 . The order is unpublished.

Appendix 4:The opinion of State of Ohio Common Pleas Court in Ohio appears at Appendix D order to grant Partial-Summary Judgment issued on January 17, 2007 ( case # 01-CVH-06-5390) signed by Judge Guy L. Reece II, 369 S. High Street, 7th floor, Columbus, Ohio 43215, 614-462-7200. This order is unpublished.

Appendix 5: The opinion of the U.S. Bankruptcy Court in Ohio appears at Appendix E, copy of the transcript by Tri-

County, and signed by Janet Atkins. The transcript contains the cross-examination of the trustee on the creditors where he perjured himself by now stating that the creditors were waiting on the funds. The trustee had file a motion with the District Court and the Sixth Circuit Court that he had disbursed the funds to the creditors to influence the Courts to dismiss the appeal under the 363(m) moot. The bankruptcy Court granted the confirmation ( case # 03-67484); Office of Clerk, Judge John E. Hoffman, Jr., U.S. Bankruptcy Court, 170 North High Street, Columbus, Ohio 43215, 614- 469-6638. This order is unpublished.

## STATEMENT OF JURISDICTION

The Court of Appeals for the Sixth Circuit issued its Order, unpublished opinion on September 1, 2009. App. 1, a motion for rehearing was filed on March 30, 2009, a motion for rehearing was denied on September 1, 2009. The U.S. Supreme Court possesses jurisdiction under 28 U.S.C. § 1254, because this Petition for Writ of Certiorari was filed within ninety ( 90 ) days following the issuance of order. Ct. Rule 13.

## FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

11 U.S.C. § 363(m) moot rule Did U.S. Congress mean for this rule to pertain to "leases and contracts."

Civil Rights Act of 1866 the right to due process of law violate Fourth teen, fifth teen Amendments

The right to operate under the Chapter11 reorganization plan law Federal Bankruptcy Rule § 1121 was denied.

The right to have a Notice of Appeal De Nova was denied by the district Court and the Sixth Circuit Court of Appeal.

The failure of the Bankruptcy Court to abstain from hearing the case and remand the case to the State Court for Jury trial.

## STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals denied the party in interest its "Notice of Appeal" of the District Court Order that denied the motion based upon the trustee's dismissal motion of 363(m) moot, that trustee had disbursed the funds to the creditors. This was not true; both Courts fail to De Nova the case. The Asset Purchase Agreement contains allegations of Fraud, Fraudulent transfers and veil piecing against ALL the Nicole Companies and Freddie L. Fulson. The fact is that there has been NO court that has found the parties guilty of these allegations. The bankruptcy Court approved the Asset Purchase Agreement without conducting any form of trial about the allegations.

The Ninth Circuit Court ruled in a similar case the fact that U.S. Congress meant for the 363(m) Moot rule to be applied in cases pertaining to "leases and contracts." The 363 (m) moot rule is not applicable in the Nicole case. The two Courts are in conflict with the law.

The bankruptcy Court and the trustee, and US trustee denied the debtor and party in interest their right to a Chapter 11 Reorganization plan.

The case started with Columbia Gas of Ohio, Columbia Gas of Kentucky and Columbia Gas of Pennsylvania filing a State Court lawsuit with their claim being that Nicole Energy Services, Inc., failed to delivery natural gas on to their pipeline for Nicole Customers. The three later on in the case added all the Nicole companies and Freddie L. Fulson individually. The Columbia companies claimed fraud,

fraudulent transfers and veil piecing. The Nicole lawyers then filed for Columbia Gas Transmission Corporation to be added to the case as a Third-Party Defendant, and the Court did add them because they were Columbia pipeline owner.

Then after one year of litigation the State Court issued a partial Summary Judgment against Columbia Gas Transmission Corporation. It was one day before a jury trial to determine the damage claim that Columbia filed it false involuntary Chapter7 petition in bankruptcy Court claiming Nicole had debts of over $ 5 million dollars to them.

## REASONS FOR GRANTING THE WRIT

The Sixth Circuit Court and the Ninth Circuit Court are in conflict over the 363(m) moot rule.

The bankruptcy Court denied the party in interest the right to Chapter11 reorganization plan.

The District Court and Sixth Circuit Court denied the party in Interest the motion for Stay Pending Appeal, allowing further bankruptcy Court actions.

The bankruptcy Court denied the party in interest its due process to the law.

The violation of the Civil Rights law of 1866 because the party in interest is a Black American.

The bankruptcy Court denied the debtor witnesses in its three day hearing and without a jury trial.

The Bankruptcy Court dismissed the Columbia involuntary Chapter 7 and then after the debtor file for a voluntary Chapter11 reorganization Plan. The bankruptcy Court allowed Columbia claim of $ 5 million dollars to be a creditor and without a hearing on the issue.

The Bankruptcy Court allowed the trustee to sale the litigation to Columbia through the Asset Purchase Agreement. This was a fraud...

The 363(m) moot rule has hurt many business owners, because the trustee has been able to file the Moot rule when

the issue is not regarding "leases or contracts, rule must be dropped and cases must be litigated fully.

## INTRODUCTION

The Plaintiffs Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc., and Columbia Gas of Kentucky, Inc., three affiliated natural gas distribution companies collectively referred to as the Columbia Gas Distribution Companies, ("CGD"), commenced this matter by the filing of an involuntary petition for relief under Chapter 7 of title 11 of the United States Code (the "Bankruptcy Code") on November 14, 2003 (the "Petition Date").

Pursuant to Bankruptcy Code section 1109(b), a party-in-interest may appear and be heard on any issue in a Chapter11 case.

Prior to the filing with this Court, CGD filed a complaint in state court against Nicole Energy Services, Inc. ("NES") based on breach of contract for alleged under deliveries of natural gas.

NES, joined by its affiliate Nicole Gas Production, Ltd., ("NGP") and its parent Nicole Energy Marketing, Inc., ("NEM"), responded by filing a third-party complaint against Columbia Gas Transmission Corporation ("TCO").

On November 14, 2003, CGD and TCO filed an Involuntary Chapter 7 petition against NES, resulting in the removal of the case to federal U.S. Bankruptcy Court.

This current controversy arises from the involuntary Chapter7 liquidation petition that was converted in April 2004 to Chapter11 reorganization and with the involuntary Chapter7 claims...

> To maintain their claims, CGD and TCO subsequently filed a proof of claim in the Chapter11 proceedings against NES.

NES filed a motion with this Court to remand the case back to state court for jury trial.

In October 2004 this Court approved the trustee for the Chapter11 bankruptcy.

The trustee lacks experience in overseeing Chapter11 bankruptcy cases.

The trustee did not file a Chapter11 re-organization plan, as required by FRBP 9019.

The trustee does not have the right to negotiate with the defendant-creditors.

The notice rule was violated by the trustee, on October 14, 2006, when he failed to notice all parties-in-interest prior to entering into the Asset Purchase Agreement with TCO.

The Federal Rule of Civil Procedure 9(b), made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure 7009, has been violated by the trustee because he committed perjury when he stated in this Court that he was not after Freddie L. Fulson's personal assets despite the fact that he included Freddie L. Fulson in his personal capacity in the adversarial consolidation complaint.

The trustee violated the Champerty Law when he accepted $100,000 as a deposit from TCO to litigate future lawsuits against the NCO companies.

There was no creditors committee established, as required, according to Chapter11 Rules.

The trustee has violated his Code of Professional Responsibilities.

The trustee was selected to be appointed by the U.S. Trustee, even though the trustee lacked Chapter11 experience.

The Adversary Consolidation was filed November 14, 2005 it was a false compliant.

The Fifth Amendment as incorporated by the Fourteenth Amendment of the Constitution provides that before a person's property can be taken they must receive due process under the law.

A party-in-interest has the legal rights to object to all parts of any case.

There were two false and ***unsubstantiated*** claims of fraud, fraudulent transfer, and veil piecing made against NES that have yet to be proven.

The Asset Purchase Agreement ("APA") sale is under valued by $2.7 million dollars according to a natural gas expert. (See Damage Report, April 2005). Julia Bodamer, natural gas expert, is an NES Consultant.

NES is not indebted to CGD.

NES is not indebted to TCO.

TCO was to install meters on wells, but did not; therefore TCO is in fact liable to NES.

The state court issued an order on September 5, 2003 for TCO to install the meters as the Federal Energy Regulatory Commission ("FERC") ruled June 11, 2003.

Dr. Riley's testimony supports NES' position that NES does not have $5 million in debt, only $5 million in paper losses.

The creditors can be paid in full, and not the five cents on a dollar proposed in the APA, if this case is remanded back to the state court.

Richard Coleman testifies in his disposition that NES owes TCO no money.

AGF, Inc. was solicited by CGD and TCO to intervene in the NES bankruptcy as a creditor.

This Court should not permit CGD and TCO to "venue shop" by removing this case to federal bankruptcy court in an attempt to avoid the state court proceedings where they may not obtain their desired outcome.

## FACTUAL BACKGROUND

On May 21, 2007, Attorney Gunner asks the trustee about his Chapter11 experience. The trustee's response was that the NES case is his first case in Chapter11. (Hearing Transcript page 178, line 17-25). The trustee's lack of experience has caused this case many problems resulting in many mistakes of both fact and law. The trustee lied on his resume about his Chapter11 experience. The trustee's application to the U.S. Trustee said he was selected from a Chapter7 panel. The trustee's lack of experience is demonstrated by his negotiation of the Asset Purchase

Agreement. The only parties to benefit under that agreement are CGD and TCO, the parties with a partial summary judgment pending against them in the state court.

The Federal Bankruptcy Rule § 1121 requires the plan be devised; and § 1106(a)(5) states that it is mandatory in

Chapter 11 cases to file the aforementioned reorganization plan or file a report of why the trustee will not file a plan. There was no reorganization plan filed by the trustee on behalf of Nicole Energy Services, Inc., nor a report as to why a plan was not filed.

In *Wells Fargo Bank, N.A. v. Guy F. Atkinson Co.*, the Court interpreted FRBP 9019 to restrict negotiation of compromises and settlements to the trustee and the debtor in possession, except in appropriate circumstances where another party will be authorized to pursue settlement or compromise of the creditor's claims. 242 B.R. 497, 502 (9th Cir. 2002). This Court held that there are two circumstances that must be met before third parties will be allowed to pursue settlement or compromise:

> (1) Existence of sufficient reasons, which may include the following: when the creditor is pursuing interests common to all creditors, where the third party is appointed for the purpose of enforcement of the plan, where the trustee has no economic incentive to pursue a claim, or where the trustee or debtor in possession has failed to fulfill the duty to prosecute actions on behalf of the estate, and
>
> (2) when an entity is pursuing a claim other than a § 506(C) claim, the entity's interests and incentives in setting the claims must be consistent with maximizing the estate for all creditors.
>
> Id. at 502-503.

A viable argument may be made that the trustee cannot negotiate a settlement with the defendant-creditor if the debtor is a debtor in possession, one who is still operating his business. The trustee has failed to prosecute an action on behalf of the estate, against Columbia entities for the debt of over $400,000.00. This violation should be reason enough for dismissal of the APA. The third party in this case

is Columbia, and they do not represent the interests of all creditors.

The trustee violated the notice rule on October 14, 2006, when the trustee telephoned the state court to cancel the pre-trial and trial, which was set for October 14- 17, 2006. The trustee was to send a notice, and a 20-day response time was to be allowed before a hearing should be conducted or the court action stopped. The trustee cancelled the state court procedure before these actions could happen. *In re Nelson Co.,* 117 B.R. 813, 820 (Bankr.E.ED. Pa. 1990). Thus, the dissemination of the notice of settlement was insufficient as a matter of law under the Bankruptcy Rules. The Court, under rule FRBP 9019 and in *Toussaint v. Howard University*, supports RFE's holding, stating that the debtor may object to a proposed settlement, particularly if the debtor is the party most clearly adversely affected by the settlement. 2005 U.S. Dist. LEXIS 38738, 14-15.

Rule of Bankruptcy Procedure 7009 provides: Fraud, Mistake, and Condition of the Mind. The trustee has filed an adversary consolidation complaint that contains fraudulent and mistaken allegations.

The trustee has violated the Champerty Law; see *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St. 3d 121, 2003-Ohio-2721, where the trustee has accepted a $100,000.00 deposit according to the Champerty law. The law in Ohio, the only state that bars this sort of practice from an attorney, says that the attorney cannot accept deposits from a party for the purpose of bringing a future lawsuit against another party. The APA, under Article II, section 2.05 (g), states that the trustee will pursue a future lawsuit against non-debtors in bankruptcy court by filing lawsuits against Nicole companies and Seaburyson Properties, Ltd., AND Freddie L. Fulson, personally, in the adversary consolidation complaint.

(Section 3.02, Article III).

The U. S. Trustee's role in Chapter11 in bankruptcy cases is to oversee the trustee. The U.S. Trustee continues to violate NES' right to a creditors committee by withholding letters which prove that a conflict of interest existed with regard to three of the creditors who were chosen by the U.S. Trustee to be on the creditors committee. The U.S. Trustee has violated rule 28 U.S. C. § 586 because: (1) there is no reorganization plan for debtor, as the rule requires; and (2) there was no creditors committee, as witness by letters from AGF Sales Direct, Enron and Michigan Consolidated Gas Company. One disputed claim (Enron) and two undisputed claimers. (See Attached: Cadwalader on Enron letter dated November 6, 2006; Donchess on AGF letter dated November 8, 2006; and Cummings on MichCon letter dated August 8, 2007).
In accordance with USC §1102, in its entirety, the trustee and the U.S. Trustee violated these rules of bankruptcy. This should be reason enough to dismiss the APA and send the case back to the state court.

The trustee has violated these disciplinary rules as follow:

> DR 7-102 (A) (1) filed a suit, asserted a position, conducted a defense, delayed a trial (here, he cancelled state court trial), or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another. The state court case was dismissed and an agreement with regard to the APA was made with CGD and TCO.
>
> Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of

existing law. No support has been provided for any of the positions taken by the trustee.

Conceal or knowingly fail to disclose that which he is required by law to reveal. The trustee withheld documents from Pennsylvania Land Holding Corporation ("PLHC") in the measurement of wells, and the creditor's committee conflict of interest letters, that were recovered from the Dept. of FOIA on July 30, 2007, made court records at the August 2, 2007 hearing. (Enron letter dated November 6, 2006; Donchess on AGF letter dated November 8, 2006; and Cummings on MichCon letter dated August 8, 2007).

Knowingly use perjured testimony or false evidence. Trustee stated to the Court that he was not after Freddie L. Fulson's personal assets (See May 23, 2007 Hearing Transcript, page 92, lines 14-22).

Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false. The trustee filed the false adversary consolidation complaint dated November 14, 2005. There had never been an evidential hearing on this merit-less complaint.

Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent. The trustee is the lawyer for Columbia and has conducted illegal and fraudulent filings in this court.

Both parties made their respective arguments on this matter during the November 9, 2005 hearing, resulting in the state court GRANTING Third-Party Plaintiff

Nicole Energy Services, Inc.'s Motion for Partial Summary Judgment as to Liability on Count III (Breach of Contract) of the Third-Party Complaint. (See State Court order August 10, 2005).

NES subsequently filed a motion to have the case remanded back to the state court, pursuant to 28 U.S.C. §1452, or, alternatively, to abstain from exercising jurisdiction over the case, pursuant to 28 U.S.C. §1334. NES was the alleged debtor in that involuntary Chapter7 petition which is now the Chapter11 proof of claim and the Asset Purchase Agreement.

The Bankruptcy Court appointed a trustee when US Senate Report No. 95-989 states in subsection (a) provides for the mandatory appointment of a disinterested trustee in the case of a public company, as defined in §1101(3), within 10 days of the order for relief, or of a successor, in the event of a vacancy, as soon as practicable. The trustee was not a disinterested trustee. His law firm represented Columbia Gas Of Ohio, Inc., in other cases. He further stated that CGD and TCO attorney, Kenneth Johnson, and he were hunting partners. This is not a disinterested trustee; he is in collusion with CGD and TCO to sale the APA to TCO and avoids the state court trial.

Section 156 of Chapter X ([former] 11 U.S.C. 516 [556]) requires the appointment of a disinterested trustee if the debtor's liabilities are $250,000 or over. Section 1104(a) marks a substantial change. The appointment of a trustee is mandatory only for a public company, which under §1101(3), has $5 million in liabilities, excluding tax and trade obligations, and 1,000 security holders. In view of past experiences, cases involving public companies will, under normal circumstances, most likely be relatively few in number, but of vast importance in terms of public investor interest. NES is not a public company; NES was brought into bankruptcy

Court because CGD filed their Chapter7 petition/ Chapter11 proof of claim falsely alleging that NES owed them over $5 million. (See The Bodamer Damage Report dated April 2005; and the Affidavit of C. Richard Coleman dated January 12, 2004- both made available to the court on August 2, 2007.)

The trustee was allowed to file its adversary consolidation complaint on November 14, 2005 and the court did not allow a hearing before the Nicole companies filed an appeal to the Federal District Court for a jury trial. The Federal District Court denied the Motion in May 2007. In response, the party-in-interest filed a motion for a hearing and the hearing was held on August 2, 2007. The Court in the hearing denied the party-in-interest the right to witnesses to prove its case. The APA hearing should not have taken place before order had been issued to prove and dismiss the adversary consolidation complaint. The Fifth Amendment, as incorporated by the Fourteenth Amendment, provides individuals with constitutional guarantees such that no property will be taken without due process of the law. This means that adequate notice must be provided when substantive rights will be affected. In this case, the trustee failed to provide notice that he had entered into an APA with TCO before he cancelled a pre-trial and trial where the jury was likely to award a substantial verdict in NES' favor. Due process also provides that an individual be given the opportunity to be heard at a hearing where substantive rights will be affected. Here, the court excluded the testimony of C. Richard Coleman and excluded exhibits of objectors to the detriment of NES. (See Hearing Transcript dated May 21, 2007, page 19, line 12-18).

The treatment of the Party-In- Interest Lawyers was all violation of the Due Process of the Law. For these reasons alone the Court should

dismiss the APA, and allow the debtor, Party in Interest to go before a jury for a State Court trial.

The bankruptcy court has not enforced the U.S. Code Title 11 Chapter11 subchapter I § 1115. Property of the Estate (b) except as provided in section 1104 or a confirmed plans or order confirming a plan, the debtor shall be in possession of all property of the estate. The Court must dismiss the APA and remand the case back to the state Court.

The rule 1104 as to the trustee finding the debtor and Party in Interest guilty of Fraud, Fraudulent Transferees and Veil Piecing are false allegation and is merit less. There has been no Court order finding Nicole parties and Freddie L. Fulson guilty before the May 21-23, 2007 or after the hearing on the APA. The hearing on the APA should have never had happen because of the non-guilty parties being in the APA. The fact that there is no evidence of these allegations the Rule 1115 (b) applies to this case. The debtor is in possession of the State Court case and the trustee is dismissed from the case and the APA is dismissed. Finally, Party- In- Interest feels this Court has violated its Fourteenth Amendment rights, and should dismiss the APA for this alone and remand the case back to the State Court. NES seeks $18- $48 million in damages for the failure of TCO to correctly measure the gas delivered by NES on to TCO's pipeline system. That case, in which TCO's liability is established and only the quantum of damages is at issue, NES was one business day away from a jury trial after two and a half years of litigation when "CGD" filed their petition and removed the state court case to this Court. The disputed nature of the claims of the four CGD's beyond question.

Julia D. Bodamer, an expert witness retained by NES, has submitted reports that conclusively establish

that the claims of the three Columbia distribution companies are not owed any money as filed by CGD and TCO. So, what is there for TCO to buy of the APA? Nothing, Columbia and the trustee is just trying to stop future lawsuits from being filed by NGP and NEM. (Bodamer report has been given to the Court on August 2, 2007 and Court refuse to have a hearing. Richard Coleman's affidavit is attached).

The APA is now based upon the proof of claims, which was filed as CGD's involuntary petition to secure collection on their claims. The only legitimate purpose for filing a Chapter7 petition was CGD knew, from their review of NES' audits and financial records, (supported by Dr. Riley's testimony, about the $5 million loss on NES' audit. The loss was a paper loss according to NES' accountant who listed it as litigation, see Hearing Record dated May 22, 2007 page 508 lines 12-25; page 509, lines1-25; page 510, lines 1-25; page 511, lines 1- 2; page 514, lines 8-17, and further states that NES has no assets other than several civil actions, the most notable being NES' massive $18-$48 million damage claim against TCO.

CGD's perfidy and bad faith is exposed in their December 22, 2003 response to NES' motion requesting the Court to remand or abstain. CGD argued that it would be premature to remand or abstain because, if the Court subsequently denied NES' motion to dismiss the petition, the Chapter7 liquidation trustee might decide not to pursue NES's $ 18- $ 48 million claim against TCO, CGD (Response to Motion for Remand or Abstention at p.7).

This extraordinary statement speaks volumes. CGD's obviously have no interest in collecting on their alleged claims against NES, what CGD want, by their own admission, is for a liquidation trustee to abandon NES's Claim against TCO and thereby spare TCO from

paying the massive damages it indisputably owes NES.

This case is now the type of case that Congress intended it to be - an involuntary liquidation case. Liquidation is appropriate if and only if the claims of the creditors are not contested and the task is simply to liquidate and distribute assets. Liquidation is completely inappropriate where the underlying claims of the creditors are disputed, as they are most definitely here. TCO's liability in the state court case has been established by court order and NES will almost certainly obtain a judgment far in excess of any and all creditors. This Court should dismiss the APA and allow NES to proceed with its state court case.

The inevitable judgment against TCO will leave NES with a very substantial balance that will allow NES, an Ohio corporation, to resume full operations outside of any bankruptcy classification.

The Federal Energy Regulatory Commission ("the FERC") issued a declaratory order in which it stated that TCO was required by its natural gas tariff to install meters to measure the gas and all gas delivered onto its pipeline system.

Despite the FERC's June 11, 2003 declaratory order, TCO continued to refuse to install meters to measure gas delivered by NES on to TCO's pipeline system from unmetered gas wells. TCO argued that NES had entered into a written agreement with TCO that relieved TCO of its duty to install the meters. This argument was rejected by the Court of Common Pleas in Franklin County Ohio in the state court case. The court issued an Order on September 5, 2003 in which it held that no agreement existed that relieved TCO of its duty to install meters and directed TCO to comply with the FERC's June 11, 2003 declaratory order. (The trustee has used the

letter called Charlie Faulk letter in the McMichael's Disposition to prove to the bankruptcy court that TCO was going to appeal the jury decision in State Court).

The Court received a copy of Mr. Coleman's affidavit concerning the facts that Nicole was owed monies from TCO. James Wright, the TCO lawyer, in the state court case said without Mr. Coleman, Nicole would have a stuff time proving its case (See

Hearing Transcript dated May 22, 2007 page 435, lines14-25; page 436 lines 1-24).

Mr. Coleman explained to James Berendsen, counsel for the state court plaintiffs, that NES had likely delivered more gas to the plaintiff Columbia distribution companies than was actually consumed by NES' end-user customers. Mr. Coleman explained that the invoices from the Columbia distribution companies to NES were based on estimated consumption, not actual consumption, in the form of meter readings at the sites of the end-users, and that the actual consumption data, which the state court plaintiffs had withheld from NES, might establish that NES had delivered more gas to the Columbia distribution companies than was consumed by NES' end-user customers.

## MEMORANDUM IN SUPPORT OF LAW

Proposition of Law No. 1:

The Asset Purchase Agreement ("APA") should be dismissed because the Proof of Claims of each of the four Petitioners is subject to a "bona-fide dispute" within the meaning of 11 USC §303(b), and there is only money owed to Nicole Energy Services, Inc. ("NES")

Now, the Court, with the benefit of the Bodamer and Coleman reports, can understand NES' claims that it owes CGD and TCO no money. The petitions by CGD and TCO persist to be "bona-fide disputes," as defined by law, such that the case on November 17, 2003 should have been remanded back to state court. A similar issue exists with regard to the APA.

I. The legal standard for a "bona-fide dispute."

11 USC § 303(b) provides that an involuntary bankruptcy under Chapter7 of this title is commenced by the filing of a petition with the bankruptcy court:

> "By three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona-fide dispute. . ."

11 USC §303(b) (l) (Emphasis added). 1

A vast majority of courts, including the Sixth Circuit, have interpreted "subject to a bona-fide dispute," have adopted the standard articulated *In re Lough*, 57 B . R. 993 (Banka. E.D. Mich. 1986):

> The legislative history makes it clear that Congress intended to disqualify a creditor whenever there is any legitimate basis for the debtor not paying the

1 When a debtor has less than twelve creditors, only one petitioner is required. 11 USC§ 03(b) (l) and (2). If a debtor has twelve or more creditors, three petitioners are necessary. Id. In this case, NES has twenty-one creditors; therefore the involuntary Chapter7 petition had to have been filed by at least three creditors that have claims that are not subject to a bona-fide dispute. See Attachment A to Opposition To Motion To Intervene Filed By AGF Direct Sales & Servicing, Inc. (December 5, 2003).

> debt, whether that basis is factual or legal. Congress plainly did not intend to require a debtor to pay a legitimately disputed debt simply to avoid the stigma of bankruptcy. Accordingly, if there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed.

57 B.R. at 5197 (Emphasis added).

In *Eastown Auto* Co., 215 B.R. 960 (AP Sixth Circuit 1998), the court held that "*Lough* establishes the proper test for determining whether a petitioning creditor's claim is subject to a bona-fide dispute." 215 B.R. at 965. The court held further that "the petitioning creditors have the burden of proof." Id. Though a counterclaim will not render a claim subject to a bona-fide dispute, offsets will.

As explained *In Re BDC,* 330 F.3d 11 (2nd Cir. 2003):

> While it is clear that a claim is not subject to a bona-fide dispute simply because the debtor has an unrelated counterclaim against a petitioning creditor, where a claim for offset arises out of the same transaction and is directly related to the creditor's underlying claim, and, if valid, could serve as a complete defense to that claim, a bona-fide dispute exists. 330 F.3d. at 120 (citations omitted).

In determining whether there is a "bona-fide dispute," the court need not resolve the Dispute; it only need determine that there is a dispute. As explained in *re Norris Brothers Lumber Co.*, 133 B.R. *599* (Bankr. N.D. Tex. 1991), "The *Lough* standard does not require the Court to determine the probable

outcome of a dispute, only its presence or absence.'" *Id.* at 604.

AGF's letter that was obtained by Mr. Fulson from the FOIA was withheld by the U.S. Trustee. The letter shows that AGF's trustee was not even aware that he was on a creditor's committee; he thought he was on an advisor committee. Creditors committees are required by law pursuant to B.R. Rule 9019.

Using the bankruptcy process as a means to promote MBC's individual interest is not consistent with the Bankruptcy Code as it will allow MBC to use bankruptcy laws as a sword rather than as a shield. Shell Oil Co. v .llaldron (In re Waldron), 785 F.2d 936, 940 (1st Cir. 1986). The fundamental requirement that bankruptcy petitions be filed in good faith will be undermined by allowing MBC to proceed with its petition. Unscrupulous creditors should not be allowed to change the outcome of an impending lawsuit by filing for refuge in the bankruptcy courts. The parties have chosen the New Jersey proceedings to litigate their dispute. MBC has answered the Debtor's complaint and is extensively engaged in the course of discovery into the merits of the Debtor's claims. An inquiry appropriate to determine the legitimate purpose of the parties who have sought to invoke the jurisdiction of bankruptcy and it is within the Court's discretion to take appropriate steps to prevent the abuse of the bankruptcy process pursuant to 11 U.S.C. §105(a). There is no legitimate purpose for this involuntary petition. MBC's motivation in filing for involuntary relief is inconsistent with the policy behind involuntary bankruptcies. MBC thus lacked good faith due to its improper purpose in filing its involuntary petition even if it had standing to file under §303(b)(2). Id.

In reaching its holding, the court pointed out that, like NES in this case, the alleged debtor had no assets:

The debtor has no assets other than the claims asserted in the New Jersey proceedings against

MBC and two defendants. The Debtor has no cash flow or employees. The Debtor was not transferring assets to outside entities nor preferring its creditors. *Id.* at 198-199.

The same is true here. Petitioners in this case filed their involuntary petition with full knowledge based on their review of NES' audits and financial records, that NES (driven into distress by TCO's under measurement and under crediting of NES' gas) has no assets. CGD have alleged in their involuntary petition and the trustee in the APA/ adversary consolidation that NES fraudulently transferred assets to affiliate Nicole companies and Seaburyson Properties, Ltd. NES vigorously denies these allegations. NES has never had the opportunity to accumulate assets due to TCO's under measurement and under crediting of its gas. In any event, the Trustee makes the same allegations of fraudulent transfers, as did Columbia in the state court case, and was one business day away from trying those allegations before a jury. When they filed their petition and removed the state court case to this Court. It was the same actions the trustee took in October 14, 2006 with the APA, one day from pre-trial hearing and three days from jury trial. If CGD and the trustee had genuinely wanted to prove fraudulent transfers they would have allowed the state court and Federal District Court matter to proceed to trial.

This is precisely the type of improper motive that caused the court to dismiss the involuntary petition in *re Manhattan Industries*. Also on point is *In re Central Hebron Associates,* 41 B.R. 444 (D.C. Hawaii 1984). In. that case, the U.S. District Court for the District of Hawaii held that the petitioner, which had first sought relief in state court, could not seek relief on the same claims in bankruptcy court. The court explained:

If a creditor can go to state court to collect a debt, the bankruptcy Courts have been adamant in refusing relief. *In re Nar-Jor Enters.* 6 B.R. 554, 586 (S.D.Fla. 1981); *In* re

*R. N. Salem Corp,* 29 B.R. 424, 431 (S.D. Ohio W.D. 1983). *In re Blaine Richards,* 16 B.R. 362 (Bankr.) E.D.N.Y.1982) mandates that even the existence of preferences does not establish the lack of adequate remedy elsewhere.

In this case, then, the questions are whether the Shin Group has an adequate remedy m state court or whether it can demonstrate some special need for bankruptcy relief. In April of 1982, the Shin Group filed a suit in state court to collect the balance of CHA's obligation to it. The bankruptcy court found that the Shin Group had failed to prosecute that action as of the tune the Order for Relief was issued on December 5, 1983. Were the Shin Group to prevail in state court, there has been no showing that it could not get a judgment against CHA upon which it could then execute. 41 B.R. at 451.

The court rejected the Shin Group's contention that it was entitled to seek relief in the bankruptcy court because of alleged fraudulent transfers:

> The Shin Group argues that its state court remedies are inadequate because of pre- and post-petition transfers that are remediable only by the Bankruptcy court. This contention is remarkably similar to those made by the creditor *In re Blaine Richards,* 16 B .*R.* 9 (Bankr. E.D. N.Y. 1982), a. *supra,* and *In re Karber* 25 B.R. 9 (Bankr. N.D. Tex. 1982). *Blaine Richard* held that the mere assertion of preferential transfer was insufficient to establish the propriety of the involuntary petition. The In *re Karber* court, in a case where one creditor holding a disputed claim brought an involuntary petition, held that state courts can set aside fraudulent transfers, and

> therefore even the creditor's allegation of fraudulent transfers was insufficient to sustain the petition. These cases belie the Shin Group's concerns regarding the adequacy of its state court remedy. Moreover, the Shin Group filed a second action in state court on November 15, 1983, alleging fraudulent transfers and seeking to have them set aside. If the Shin Group believes that it can persuade the state court to set- aside the allegedly fraudulent transfers, then its assertion that the bankruptcy court offers the only possible adequate remedy appears insincere. The bankruptcy court was never meant to serve as an insurance policy for creditors who fear that the state courts will not give them what they want. *In re R.N. Salem Corp.*, 29 *B.R.* 424,429 *(S* .D. Ohio W.D.1983). 41 B.R. at 451.

Proposition of Law No. 2:
The claim of Columbia Gas of Ohio, Inc. is subject to a "Bona-fide Dispute."
See discussion above.

Proposition of Law No. 3:
The claim of Columbia Gas of Pennsylvania, Inc. is subject to a "Bona-fide Dispute."
See discussion above.

Proposition of Law No. 4:
The claim of Columbia Gas of Kentucky, Inc. is subject to a "Bona-fide Dispute."
See discussion above.

Proposition of Law No. 5:
The claim of Columbia Gas Transmission Corporation

("TCO") is subject to a "Bona-fide Dispute."
See discussion above.

Proposition of Law No. 6:
("AGF") attempted intervention cannot cure the standing deficiencies of the four Columbia Gas Companies.

It is well settled that the intervention of a qualified petitioner with an undisputed claim cannot save a defective involuntary petition/now proof of claim, from dismissal. See, e.g., *In re Centennial Insurants Association, Inc., 119* B.R. 543 (W.D. Mich. 1990) (where original involuntary petition was defective because debt of petitioning creditor was subject to bona-fide dispute, intervention of creditor with undisputed claim will not purge taint as to allow involuntary petition to proceed); *In re Norpiss Brothers Lumber Co. Inc.*, 133 B.R. 599 (Bankr. 1. I.D. Tex. 1991) (when original involuntary petition is filed in bad faith, intervention of good faith creditor does not normally purge original creditor's bad faith filing); *In re Aha Tirle Co.55* B.R. 133 (Bankr. Utah 1985) (defective involuntary petition generally cannot be cured by joiner or additional creditors where petition is clearly insufficient on its face or petition/proof of claim was filed in bad faith with view of being supported later by intervention of additional creditors). The Columbia companies, none of which are qualifying petitioners since their claims against NES are all in dispute, cannot prevent the dismissal of their petition/APA by their solicitation of AGF as an intervener.

Proposition of Law No. 7:
Even if this Court were to conclude that there are three Petitioners with undisputed claims, the APA should still be dismissed because it was all filed in bad faith for improper motive.

It is well settled that the bankruptcy court has the discretion to dismiss the Chapter7 in November, 2003 and now has the discretion to dismiss the Proof of Claim. The law still gives the court the right in this Chapter11 bankruptcy

case, even if it is filed by qualifying petitioners with standing, if the petition/ proof of claim are filed in bad faith to gain tactical advantage in the state court litigation.

On point is *In re Manhattan Industries, Inc.*, 224 B.R. 195 (Bankr. M.D. Fla. 1997). In that case, the alleged debtor moved to dismiss the involuntary petition filed by Manhattan Bagel Company, Inc. ("MBC") on two grounds. The alleged debtor argued that the petition should be dismissed because MBC's claim was subject to a born fide dispute and because the involuntary petition/proof of claim was filed in bad faith to derail a state court action filed by the alleged debtor against MBC in state court. The court granted the motion to dismiss on both grounds.

The dismissing of the case on the grounds that the petition was filed to frustrate state court litigation, the court stated:

> Bankruptcy laws, historically, have provided creditors with the opportunity to initiate involuntary proceedings against the Debtor. The central policy behind involuntary petitions was to protect the threatened depletion of assets or to prevent the unequal treatment of similarly situation creditors. Whenever this situation is implicated, bankruptcy policy dictates that a creditor be able to compel liquidation or reorganization of the Debtor's estate through an involuntary petition.
>
> To effectuate proper implementation of this federal bankruptcy policy, it is the province of the Court to ascertain a creditor's objective in filing for relief and determine whether the petition was filed in good faith.

*In re Manhattan Industries, Inc.*, 224 *B.R.* at 200-201

(citations omitted).

The court went on to find that the petitioners' claim was filed in bad faith for improper motive.

> The state court litigation was filed by the Debtor after it unsuccessfully tried to negotiate a resolution with MBC regarding its dealings pursuant to its franchise agreement. Faced with a potential monetary judgment against it, MBC has tactically decided to take the offensive by filing an involuntary petition against NES, the Chapter11 debtor.

Id. at 201 (Emphasis added).
The court held that use of the bankruptcy court for this purpose was improper and warranted dismissal.

## III. CONCLUSION AND PRAYER FOR RELIEF

The Sixth Circuit Court of Appeals failed to De Nova the Notice of Appeal. The purpose of the notice of Appeal is to reverse the bankruptcy Court sale of the debtor asset which is a lawsuit against a fortune 500 company. The fact that the trustee the bankruptcy Court and the Sixth Circuit Court dismissed the notice of appeal based upon the 363(m) moot rule. This set-up a Conflict between the Sixth Circuit Court and the Ninth Circuit Court over the U.S. Congress decision that the 363(m) moot only applies to " leases and contracts" and not lawsuits. Petitioners pray that the decision of the Sixth Circuit Court, the district Court, and the bankruptcy Court are reversed, and the case remanded for jury trial to the State of Ohio Common Pleas Court. The U. S. Supreme Court can grant this relief based upon the above facts.

Respectfully submitted,

Freddie L. Fulson, Pro Se
P.O. Box 2158
Westerville, Ohio 43086-2158
614-602-9294
fulson@att.net

The petition for writ of certiorari should be granted.
Respectfully submitted,

Date 1/7/10/09

Freddie L. Fulson

Freddie L. Fulson

**APPENDIX A**
Case 09-3366

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sept 01, 2009
LEONARD GREEN, Clerk

In re: NICOLE ENERGY SERVICES, INC., ORDER

Debtor,

FREDDIE L. FULSON, PRESIDENT Nicole Energy
Energy Services, Inc.,
Appellant,

v.

LARRY J. MCCLATCHEY, Trustee,
Appellee,

Before: GUY and GRIFFIN< Circuit Judges

Acting Prose, Freddie L. Fulson appeals the district court's order that dismisses a bankruptcy

Appeal brought by the debtor, Nicole Energy Services, Inc. In a prior order, we granted a motion
To dismiss the appeal because: ( 1) Fulson cannot represent a coporation, and ( 2) the manner
is statutorily moot under 11 U.S.C. § 363 (m). Fulson has filed a motion for expedited reversal of
the court's order. Having construed the motion as one for rehearing we find no error in our
prior order.

Therefore, the motion for expedited reversal is DENIED.

ENTERED BY ORDER OF THE COURT
/s signature
Leonard Green, Clerk

Mr. Freddie L. Fulson
P.O. Box 2158
Westerville, OH 43086

Ms. Eleanor B. Haynes
399 E. Main Street
Suite 200
Columbus, OH 43215-0000

Ms. Christy Allison Prince
Kegler, Brown, Hill & Ritter
65 E. State Street
Suite 1800 Capitol Square Office Building
Columbus, OH 43215

Re: Case No. 09-3366,
Freddie Fulson v. Larry McClatchey, et al
Originating Case No. : 08-00463

Dear Sir or Madam,

The Court issued the enclosed (order/Opinion) today in this case.

Sincerely yours,

s/Laura A. Jones
Case Manager
Direct Dial No.
513-564-7023

cc: Mr. James Bonini

Enclosure

Na mandate to issue

No. 09-3366

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| In re: NICOLE ENERGY SERVICES, INC., | ) | |
| | ) | |
| Debtor. | ) | |
| | ) | |
| | ) | |
| FREDDIE L. FULSON, | ) | |
| | ) | |
| Plaintiff - Appellant, | | |
| v. | ) | O R D E R |
| | ) | |
| LARRY J. MCCLATCHEY, Trustee, | ) | |
| | ) | |
| Defendant - Appellee. | ) | |

Before: GUY, SILER, and GRIFFIN, Circuit Judges.

The debtor, Nicole Energy Services, Inc. ("NES"), is a natural gas marketing company. The appellant, Freddie L. Fulson, is the president of NES and a primary shareholder. The appellant has filed an "Emergency Motion for Expedited Appeal" in which he notes that a hearing is scheduled before the bankruptcy court on April 15, 2009. The appellee moves to dismiss the appeal as statutorily moot under 11 U.S.C. 363(m).

This is not the first such appeal brought to this court. In brief, NES was the subject of an involuntary petition in bankruptcy files by its creditors. Its primary asset was unliquidated claim against Columbia Gas Transmission Corp. for credits under gas gathering and transportation agreements. The claim was pending in state court.

A Chapter 11 trustee was appointed fro NES, who is the appellee in this appeal. The trustee assumed control of the state court litigation and negotiated a settlement. The settlement was structured as a sale of the debtor's claims to Columbia Gas. The trustee sought approval of this sale in the bankruptcy court. After a three-day hearing, the bankruptcy court approved the sale. It also denied a stay of the order. The trustee closed the sale in April 2008.

In separate proceedings, the appellant brought an action against the bankruptcy court to stay the sale. The action was dismissed. This court also dismissed a subsequent appeal from the order. Fulson v. U.S. Bankruptcy Court, No. 08-3540 (6th Cir. Jul. 29, 2008) (order). The appellant also appealed the sale order. That appeal was dismissed by the district court, and this court dismissed a subsequent appeal as moot. Fulson v. McClatchey, No. 08-424277 (6th Cir. Jul. 29, 2008) (order).

Finally, NES, through counsel, appealed the sale order. Although he was not listed as a party on that appeal, Fulson filed several pro se pleadings and motions. In an order entered March 4, 2009, the district court granted a motion to dismiss the appeal. It concluded that Columbia Gas was a good faith purchaser of the assets at issue. It further concluded that because there had been no stay of the sale, the appeal was moot under 11 U.S.C. 363(m). Fulson appeals.

As were the prior two appeals, this appeal also must be dismissed. NES, not Fulson, filed the appeal in the district court from which this appeal is taken. Fulson was not a party and was not granted intervenor status. Neither a corporate officer nor a shareholder may appear on behalf of a corporation. Taylor Steel, Inc. v. Keeton, 417 F .3d 598, 603 (6th Cir. 2005).

Further, because the sale has now been consummated, this appeal is moot. Pursuant to the bankruptcy mootness statute, 11 U.S.C. 363(m), "[t]he reversal or modification on appeal

of an authorization . . . of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchases or leased such property in good faith" unless the sale or lease was stayed pending appeal. 11 U.S.C. 363(m). There was no stay of the sale of assets. Thus, even were this court to reverse the order of the bankruptcy court, the decision would not affect the validity of the sale. See in re Parker, 499 F .3d 616, 620-24 (6th Cir. 2007); In re made in Detroit, Inc., 414 F .3d 576, 581 (6th Cir. 2005); Weingarten Nostat, Inc. v. Serv. Merch. Co., Inc., 396 F .3d 737, 742 (6th Cir. 2005).

Therefore, the motion to dismiss this appeal is GRANTED. The request for an expedited appeal is denied as moot.

ENTERED BY ORDER OF THE COURT

"s/ signature
Leonard Green
Clerk

**APPENDIX B**

No. 08-4277

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| In re: NICOLE ENERGY SERVICES, INC., | ) | |
| | ) | |
| Debtor. | ) | |
| ---------- | ) | |
| FREDDIE L. FULSON, | ) | |
| | ) | |
| Plaintiff - Appellant | ) | |
| | ) | |
| v. | ) | |
| | ) | ORDER |
| | ) | |
| LARRY J. MCCLATCHEY, Trustee, | ) | |
| | ) | |
| Defendant - Appellee. | ) | |
| | ) | |

Before: BATCHELDER, ROGERS, and KETHLEDGE, Circuit Judges.

Freddie L. Fulson submitted a motion for reconsideration of this court's March 13, 2009 order dismissing the appeal as moot.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or face when it entered the decision. See Fed. R. App. P. 40(a).

The motion for reconsideration is denied
ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

Case No. 08-4277

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| In re: NICOLE ENERGY SERVICES, INC., | ) | |
| | ) | |
| Debtor. | ) | |
| ---------- | ) | |
| FREDDIE L. FULSON, | ) | |
| | ) | |
| Plaintiff - Appellant, | ) | |
| | ) | |
| v. | ) | |
| | | ORDER |
| LARRY J. MCCLATCHEY, Trustee, | ) | |
| | ) | |
| Defendant - Appellee. | ) | |
| | ) | |

Before: BATCHELDER, ROGERS, and KETHLEDGE, Circuit Judges.

This matter is before the court upon consideration of the motion of the appellee to dismiss this appeal as moot because the debtor's claims have been sold by the debtor's Chapter 11 trustee, and a stay of the sale was not obtained. Freddie L. Fulson responded by arguing that the appeal should not be dismissed because the motion to dismiss is late, the district court failed to make a denovo review of the bankruptcy record, the appellee nerver filed a brief in the district court, the appellee is committing fraud upon the court, a hearing was never held to determine whether the purchaser of the debtor's claims was a good-faith buyer, and the funds from the sale have not been disbursed to the creditors. Further, Fulson argues that the sale of the debtor's assets does not moot the appeal because the issue he is raising is that the asset purchase agreement should be reversed, overturned and vacation. Fulson also filed a motion to expedite in which

he states that because there has been no objection to his notice of appeal that this court should reverse the district court orders from which he appealed, and remand the case back to the state court for a jury trial.

From the review of the documents before the court, it appears that Fulson has attempted to receive relief from a purchase agreement and the sale of the debtor's claims in a bankruptcy case, two district court cases, and a prior appeal to this court. As indicated below and as previously stated in the orders entered by this court in appeal No. 08-3540, the failure of Fulson to receive a stay moots the case. See 11 U.S.C. 363(m).

It appears that the Freddie L. Fulson, the appellant, is the principal owner of Nicole Energy Services, Inc., the debtor. The debtor filed a third-party complaint against Columbia Gas Transmission Corp. (TCO) in state court, and a case was filed in the United States Bankruptcy Court where the debtor was appointed a chapter 11 trustee. The trustee arranged for the sale of the debtor's claims against TCO under an asset purchase agreement, the bankruptcy court approved the sale, and the trustee assigned the debtor's claims in state court to TCO. A stay pending appeal was denied, and the sale was consummated on April 25, 2008.

Meanwhile, Fulson filed on January 30, 2008 a notice of removal of the bankruptcy action to the district court (district court case No. 08-CV-090). The district court on April 28, 2008 denied removal, determined that it lacked jurisdiction, and dismissed the case. Fulson appealed that order to this court (appeal No. 08-3540). This court on July 29, 2008 determined that the failure of Fulson to obtain a stay rendered his appeal moot, the appeal was dismissed, and the request for a stay was denied as moot.

Fulson on May 16, 2008 filed an appeal in the district court seeking review of the rulings of the bankruptcy court (district court case No. 08-CV-478). A motion by Fulson for a stay was

denied on August 6, 2008. On August 14, 2008, the district court determined that he case was moot, and dismissed the appeal. Reconsideration was denied on August 26, 2008, and Fulson appealed on September 15, 2008 (appeal No. 08-4277).

Appeal No. 08-4277 is currently before this court. As previously stated by this court in appeal No. 08-3540 on September 15, 2008, the matter which Fulson is seeking to have reviewed is moot because any possible reversal of the authorization of sale would not affect the validity of the sale because the sale was not stayed pending an appeal. See 11 U.S.C. 363(m); In re Parker, 499 F .3d 616, 620-24 (6th Cir. 2007); In re made in Detroit, Inc., 414 F .3d 576, 581 (6th Cir. 2005); Weingarten Nostat, Inc. v. Serv. Merch. Co., 396 F .3d 737, 742 (6th Cir. 2005).

Accordingly, it is ordered that appeal No. 08-4277 is dismissed as moot.

ENTERED BY ORDER OF THE COURT

"s/signature
Leonard Green, Clerk

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

NICOLE ENERGY SERVICES, INC.,
Debtor/Appellant,

Case No. 08-CV-0463

v. LARRY j. MCCLATCHEY,

JUDGE ALGENON MARBLEY

Trustee/Appelle,

ORDER

On March 9, 2009, interested party Freddie L. Fulson ("Fulson") filed a motion requesting that the Court reconsider its March 4, 2009 Order dismissing Appellant-Debtor Nicole Energy Services, Inc."s appeal as statutorily moot. ( Doc. No. 28) Fulson also appealed the dismissal to the Sixth Circuit on March 31, 2009. During the pendency of the motion to reconsider, the Sixth Circuit affirmed this Court's ruling. Therefore the Court finds that Fulson's Motion for Reconsideration is Moot.
IT IS SO ORDERED.

s//Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT COURT

Dated August 3, 2009
Freddie L. Fulson
P.O. Box 2158
Westerville, Ohio 43086

IN THE UNITED STATES DISTRICT COURT FOR
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| NICOLE ENERGY SERVICES, INC., | : | |
| | : | |
| Debtor/Appellant, | : | |
| | : | |
| v. | : | |
| | : | Case No. 08-CV-0463 |
| | : | |
| LARRY J. MCCLATCHEY, | : | JUDGE ALGENON L. MARBLEY |
| | : | |
| Trustee/Appellee | : | |

OPINION & ORDER

## I. INTRODUCTION

Appellee and bankruptcy trustee Larry J. McClatchey ("McClatchy") moves to dismiss the appeal (doc. No. 3) filed by Appellant and debtor Nicole Energy Services, Inc. For the reasons explained below, the Court GRANTS McClatchy's motion

## II. BACKGROUND

### A. Facts

This case is an appeal from bankruptcy case no. 03-67484, which involved the bankruptcy of debtor Nicole Energy Services, Inc. ("NES"), a natural gas marketing company. Freddie L. Fulson ("Fulson") is NES's President. He is also a NES shareholder and a shareholder in NES's parent company, Nicole Energy Marketing, Inc.

At the time the bankruptcy proceeding was filed, Columbia Gas Transmission Corporation ("Columbia Gas") and its

affiliates had sued NES in Ohio state court alleging breach of contract claims against NES ("State Court Case"). In that case, NES filed a third-party complain against Columbia Gas seeking millions of dollars for alleged under-credits by Columbia Gas under gas gathering and transportation agreements between the companies. This unliquidated claim against Columbia Gas in the State Court Case was NES's greatest asset. During the course of NES's bankruptcy proceeding, McClatchey, as trustee for NES, assumed control of NES's State Court Case claims. Eventually, McClatchey negotiated a settlement of the State Court Case claims. The settlement was structured as a sale of NES's claims to Columbia Gas under an Asset Purchase Agreement ("the Sale").

In October of 2006, McClatchey filed a Motion to Sell Property Free and Clear of Liens ("Sale Motion") with the bankruptcy court, seeking approval of the sale. NES and Fulson objected to the Sale. However, after conducting a three day evidentiary hearing on McClatchey's Sale Motion and the related objections, the bankruptcy court overruled the objections and approved the Sale.1 On April 14, 2008, the bankruptcy court entered an Order Authorizing and Approving the Trustee's Sale Motion ("the Sale Order"). (Case No. 03-67484, doc. no. 461.)

NES and Fulson immediately sought, but were denied, a stay of the Sale Order pending appeal. On April 25, 2008 the sale closed and Columbia Gas transferred over three million dollars to McClatchey as trustee for NES's estate. (Case No. 03-67484, doc. No. 480.) In exchange, McClatchey delivered an assignment of the NES's claims against Columbia Gas.

B. Procedural History

The bankruptcy court's approval of the Sale gave rise to three appeals.

First, on January 30, 2008, Fulson brought an action against

the U.S. Bankruptcy Court in the United States District Court for the Southern District of Ohio, Fulson v. U.S. Bankruptcy

Footnote

1 The bankruptcy court is also issued a 94 page memorandum Opinion memorializing the legal and factual basis for its approval of the Sale. (Case No. 03-67484, doc. no. 453.)

Court, case no. 2:08-cv-90. In that action, Fulson sought an expedited aremand of NES's State Court Case back to state court from the bankruptcy court, to which it had been remove.2 On May 8, 2008, Fulson filed a motion seeking to stay the Sale Order. Judge Gregory L. Frost dismissed the case. Fulson appealed the dismissal to the Sixth Circuit Court Court of Appeals. On a July 29, 2008, the Sixth Circuit dismissed Fulson's appeal as moot under 11 U.S.C. 363(m) because Fulson had not obtained a stay of the Sale and the Sale had been consummated.3

Second, on May 13, 2008, NES filed a notice of appeal with this court in the case sub judice. In this action, NES challenges the validity of the Sale Order. The notice of appeal did not list Fulson as a party to the appeal. Similarly, NES's Statement of Election, which states that NES elects to have its appeal heard before the United States District Court rather than the Bankruptcy Appellate Panel for the Sixth Circuit, does not list Fulson as an appellant.

On June 2, 2008, McClatchey moved for dismissal of the appeal on the grounds that it is moot under 11 U.S.C. 363(m) because the sale that forms the basis of the appeal has already closed and has been consummated. NES has not responded to the motion to dismiss. In fact, NES had not made any filings in this case since its notice of appeal was filed4 and appears to have abandoned its appeal. Instead, Fulson has opposed the motion to dismiss. He has also filed numerous additional motion and briefs in this case, even though he is a

not party to this action.

Footnote

2 Ultimately, portions of the state Court Case were remanded back to Ohio state court on July 15, 2005, after the trustee took control of the State Court Case and requested remand. (Case No. 03-67484, doc. no. 222.)

3 McClatchey has requested leave to file the Sixth Circuit's ruling as additional authority in support of his Motion to Dissmiss in this case (doc. no. 11). That request is GRANTED

4 Including failing to file its appellant's brief pursuant to Fed. R. Bankr. P. 8009.

Third, on May 16, 2008, Fulson filed his own appeal challenging the Sale Order before Judge Frost, Fulson v. McClatchey (In Re Nicole Energy Services, Inc.), Case No. 2:08-cv-478. Fulson's appeal is essentially identical to NES's appeal before this Court. McClatchey moved to dismiss Fulson's appeal as moot for the same reasons he asserts in the case sub judice. On August 14, 2008, Judge Frost granted McClatchey's motion and dismissed Fulson's appeal as moot.

## III. LAW & ANALYSIS

Under 11 U.S.C. 363(m) of the Bankruptcy Code, NES was required to obtain a say of the Sale Order and the consummation of the Sale itself to preserve this court's ability to rule on the validity of the Sale of NES's State Court Case claims. Section 363(m) provides:

> [t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchases or leased such property in a good faith, whether or not such entity knew of the pendency of the appeal, unless such

authorization and such sale or lease were stayed pending appeal.

11 U.S.C. 363(m).

Based on the language of 363(m), "[b]bankruptcy's mootness rule applies when an appellant has failed to obtain a stay from an order that permits a sale of debtor's assets." 255 Park Plaza Assocs. Ltd. P'ship v. Conn. Gen. Life Ins. Co. (In re 255 Park Plaza Assocs. Ltd. P'ship), 100 F.3d 1214, 1216 (6th Cir. 1996) (internal citations and quotations marks omitted). It is well established in the Sixth Circuit that failure to obtain a stay of a sale of an estate's assets to a good faith purchaser "limits appellate review of a consummated sale... regardless of the merits of legal arguments raised against it." See, e.g., Made in Detroit, Inc. v. Official Comm. Of Unsecured Creditors of Made In Detroit, Inc. (In re made in Detroit, Inc.), 414 F .3d 576, 581 (6th Cir. 2005) (internal citations and quotations marks omitted); accord Parker v. Goodman (In re Parker), 499 F .3d 616-21 (6th Cir. 2007).

The bankruptcy mootness rule is "predicated on the particular need to encourage participation in bankruptcy asset sales and increase the value of the property of the estate by protecting good faith purchasers from modification by appeals court." Weingarten Nostat, Inc. v. Serv. Merch. Co., 396 F. 3d 737, 741 (6th Cir. 2005). The term "good faith purchaser" is not defined in the bankruptcy code. The courts have defined a "good faith purchaser" as one who purchases the assets "for value" and "in good faith." Made in Detroit, Inc., 414 F .3d at 581 (internal citations omitted). "To show [a] lack of good faith, the debtor must demonstrate that there was fraud or collusion between the purchaser and the seller or the other bidders, or that the purchaser's actions constituted an attempt to take grossly unfair advantage of the bidders." 255 Park Plaza Assocs., 100 F .3d at 1218.

In this case, the record shows that the bankruptcy court approved the Sale on April 14, 2008, the Sale was

consummated on April 25, 2008, and NES and Fulson both failed to obtain a stay of that Sale in the bankruptcy court or the district court. Columbia Gas paid a purchase price of $2.7 million for the assets at issue.5 This is sufficient to meet the "for value" prong of a good faith purchase.

Furthermore, there is no evidence of any fraud or collusion between Columbia Gas and McClatchey.6 In fact, the record below demonstrates that the bankruptcy court carefully and

Footnote

5 Columbia Gas paid an additional $621,234.75 in administrative fees to cover the trustee's legal expenses.

6 Fulson asserts vague and conclusory claims of fraud and collusion in his "Memorandum Response and Objection to Appellee motion to Dismiss the Appeal." (Doc. no.

Thoroughly evaluated whether the Asset purchase Agreement was fair and reasonable, was entered into at arms length, and was in good faith and concluded that it was. (Case No. 03-67484, doc. no. 453, pp. 48-51.) Neither NES nor Fulson have presented any evidence undermining that ruling. Therefore, this Court concludes that Columbia Gas was a good faith purchaser.

Because NES failed to obtain the required stays prior to the consummation of the Sale, and because the Sale of NES's claims was to a good faith purchaser, this Court concurs with both Judge Frost's and the Sixth Circuit Court of Appeals' rulings in the related appeals and finds that NES's appeal is statutorily moot. Consequently, this case is dismissed. See Sugarloaf Indus. & Mktg. Co., v. Quaker Citty Castings, Inc. (In re Quaker City Castings, Inc.), No. 04-8045, 2005 WL 3078607, at *7 (6th Cir. BAP Nov. 18, 2005) (dismissal is appropriate when conclusory allegations of fraud are not supported by evidence).

As an administrative matter, the Court notes that Fulson has filed numerous motions and opposition briefs in this case, despite the face that this is NES's appeal, NES has its own counsel, Fulson was not named on the notice of appeal as an appellant, Fulson has filed and lost an identical appeal in his own name, and Fulson has not formally motioned to intervene in this case.

Footnote

5.) However, as Fulson is not the appellant in this matter, has not been granted leave to intervene, and has already lost his own appeal on exactly the same grounds, the Court believes Fulson has no basis to oppose motions filed in this case. Nevertheless, the Court has reviewed his "opposition brief." In his various filings in this matter, Fulson accuses: McClatchey, Columbia Gas, the Bankrupt Court, the Clerkof the Bankruptcy Court, and the Clerk of the Sixth Circuit Court of Appeals of fraud. ( Doc. No.5 p. 3-5, doc. No. 13, 13, p.1) As far as the settlement with Columbia Gas; the bankruptcy court approved the Sale; Columbia Gas sued NES in the State Court Case and " wanted to protect their money from the jury trial.;" and his speculation that Columbia Gas " must have had a relationship with the bankruptcy Court Judge, to gain his support." ( See doc. No. 5, Memorandum Response & Objection to Appellee Motion to Dismiss the Appeal, p.4.) Such speculation is insufficient evidence to establish a lack of good faith even if Fulson were permitted to intervene in this appeal.

As Fulson is proceeding pro se, the Court will construe his vociferous as requesting permission to intervene in this case. However, as the underlying appeal is statutorily moot, his requests to intervene and various motions are also MOOT.

IV. CONCLUSION

For the reasons set forth above, appellee McClatchey's Motion to Dismiss the Appeal ( doc. No. 3) is GRANTED.
IT SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
Dated: March 4, 2009
District Court reconsideration denied on August 3, 2009.

**APPENDIX D**

**IN THE COURT OF COMMON PLEAS**
**OF FRANKLIN COUNTY, OHIO**
**GENERAL DIVISION**

COLUMBIA GAS OF OHIO, INC., et al.,:

Case No. 01 CVH-06-5390

Plaintiffs:

v. : Judge: Guy L. Reece, II

NICOLE ENERGY SERVICES, INC., et al.,:
Defendants/Third-Party Plaintiffs,:
v: COLUMBIA GAS TRANSMISSION CORP.,:
Third-Party Defendant

**DECISION AND ENTRY**
**GRANTING THIRD-PARTY PLANTIFF NICOLE ENERGY SERVICES, INC.'S AUGUST 10, 2005 MOTION FOR PARTIAL SUMMARY JUDGEMENT AS TO LIABILITY ON COUNT III (BREACH OF CONTRACT) OF THE THIRD-PARTY COMPLAINT**

This matter is before the Court upon Third-Party Plaintiff Nicole Energy Services, Inc.'s (hereinafter "NES") August 10, 2005 Motion for Partial Summary Judgment as to Liability on Count III (Breach of Contract) of the Third-Party Complain; Third-Party Defendant Columbia Gas Transmission Corporation's (hereinafter "TCO") October 27, 2005 Memorandum Contra third-Party Plaintiff Nicole Energy Services, Inc.'s Motion Partial Summary Judgement; Third-Party Plaintiff Nicole Energy Services, Inc.'s October 31, 2005 Reply Memorandum in Support of its Motion for Partial Summary Judgement as to Liability on Count III (Breach of contract); Third-Party Plaintiff Nicole Energy Services, Inc.'s January 4, 2006 Post-HeHheHearing Memorandum in Support of its Motion for Partial Summary Judgment as to Liability on Count III

(Breach of Contract); and the parties' respective arguments during the November 9, 2005 hearing on this matter.

For the reasons that follow, the Court GRANTS Third-Party Plaintiff Nicole Energy Services, Inc.'s August 10, 2005 Motion for Partial Summary Judgment as to Liability on Count III (Breach Contract of the Third-Party Complaint on this 17th day of January 2006

## BACKGROUND

This matter originated upon the filing of a complaint, subsequently amended and corrected, by Plaintiffs Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc., and Columbia Gas of Kentucky, Inc., three affiliated natural gas distribution companies collectively referred to as the Columbia Gas Distribution companies (hereinafter "CGD"). CGD filed said complaint against Nicole Energy Services, Inc. (hereinafter "NES"), based on breach of contract for alleged under- deliveries of natural gas. NES, joined by various affiliates including its production affiliate Nicole Gas Production, Ltd. (hereinafter "NGP") and its corporate parent Nicole Energy Marketing, Inc. (hereinafter "NEM"), then filed a third-party complaint against Columbia Gas Transmission corporation (hereinafter "TCO"), a federally regulated interstate natural gas pipeline company and an affiliate of CGD, alleging that TCO had under measured and under credited the quantities of gas delivered by NES via TCO's pipeline system.

The matter was scheduled for trial on Novemeber 17, 2003. However, on or about November 14, 2003, CGD and TCO filed an involuntary Chapter 7 petition against NES, resulting in the removal of the case to the federal U.S. Banktruptcy court for the Southern District of Ohio, Easter Division (hereinafter"Bankuptcy Court"). On or about November 17, 2003, NES moved the Bankruptcy Court to remand the removed case back to this Court, pursuant to 28 U.S.C. 1452,

or, alternatively, the abstain from exercising jurisdiction over the case, pursuant to 28 U.S.C. 1334.

The Chapter 7 case was subsequently converted into a Chapter 11 case, and the Bankruptcy court held NES' motion to remand/abstain in abeyance until a Chapter 11 Trustee was appointed. The Bankruptcy Court approved the appointed Chapter 11 Trustee for NES (hereinafter "Trustee") on October 8, 2004.

On April 5, 2005, the Trustee filed with the Bankruptcy Court a motion seeking a remand of the third-party complaint, pursuant to 28 U.S.C. 1452 and/or 28 U.S.C. 1334(c)(1). The Bankruptcy court issued its decision with respect to the same on July 15, 2005, wherein it dismissed certain claims, remanded certain claims, and decided to hold certain claims in abeyance due to the insolvency of the NES estate.

With respect to the complaint filed by CGD, the Bankruptcy court found that claims One, Two and Three ("Breach of Contract claims") would impact the Debtor/Creditor relationship in the case before it, and consequently decided to retain jurisdiction of the same. The Bankruptcy court further decided to hold those claims in abeyance until the NES estate is once again solvent. With regard to Claim Four ("Fraudulent Conveyance Claim"), Claim Five ("Veil Piercing Claim") and claim Six ("Injunctive Relief"), the Bankruptcy Court held it is the Trustee, and not CGD, who is the real party in interest; accordingly, the court dismissed the claims without prejudice in the event the Trustee decides to bring them forward.

With respect to the Third-Party complaint filed by NES and its affiliates, the Bankruptcy court found claim One ("Injunctive Claim") to be unripe and dismissed the same without prejudice. With regard to claim Two ("negligence Claim by NES"), Claim Three ("Breach of Contract Claim by NES"), Claim Four ("Negligence Claim by NEM") and Claim Five ("Breach of Contract Claim by NEM"), the Bankruptcy

Court found the claims advance state law and are ripe for a decision; accordingly, the Bankruptcy court remanded these four claims to this Court.

On August 10, 2005, NES filed a Motion for Partial Summary Judgment as the Liability on Count III (Breach of Contract) of the now-remanded Third-Party complaint. Therein, NES claims it is entitled to summary judgment in its favor on the breach of contract claim, as TCO breached the terms of the parties' service agreement and failed to install meters to measure the gas delivered by NES into TCO's interstate pipeline system from 70 un-metered wells owned by NES' production affiliate, NGP.

TCO owns an interstate natural gas pipeline, and provides transportation and storage services to natural gas marketers in a number of states, including Ohio and West Virginia. TCO also owns "gathering" lines that connect gas wells to TCO's interstate pipelines. Accordingly, TCO is subject to regulation by the Federal Energy Regulatory commission (hereinafter "the FERC"). Section 717c(C) of the natural Gas Act, 15 U.S.C. 171, et seq., requires interstate natural gas pipeline companies like TCO to file a tariff with the FERC, "under such rules and regulation as the FERC may prescribe." Said tariff must show "all rates and charges for any transportation or sale subject to the jurisdiction of the commission, and the classification, practices, rules, and regulations affecting such rates, charges, and services, together with all contracts related thereto." 18 CFR 154,1. Furthermore, the FERC requires that said tariff includes the "Rate Schedule" for each storage and transportation service offered by the pipeline company, the "General Terms and Conditions" pursuant to which the pipeline company operates, and the "Form Contracts" for each service offered by the pipeline company. 18 CFR 154.108-154.110.

Pursuant to Section 5.6 of the General Terms and Conditions of TCO's tariff, West Virginia law governs the interpretation of any Service Agreements or any other agreements "entered

into between Shipper and Transporter, including any provisions of this Tariff related to such agree agreements."

NES and TCO entered into an Interruptible Gathering Service Agreement, effective December 1, 1999, which incorporated by reference the provisions of Section 26 of the General Terms and conditions of TCO's tariff. Until August 15, 2003, Section 26.9(b) of the General Terms and Conditions of TCO's tariff, titled "measurements," stated that "[u]nless otherwise agreed to in writing...Transporter [TCO] will install, operate and maintain measuring stations and equipment by which the volumes of natural gas or quantities of energy received by Transporter are measured." NES and TCO likewise entered into a Firm Transportation Service Agreement, effective October 2, 2000, which also incorporated by reference Section 26.9(b) of TCO's tariff, in effect prior to August 15, 2003. NES maintains that, pursuant to West Virginia law, TCO breached the terms of the parties' Service Agreement by failing to install such measuring stations and equipment at 70 un-metered wells, which in turn resulted in TCO's under measurement and under crediting of gas delivered by NES into TCO's pipeline to be delivered to NES end-user customers. NES maintains the FERC's interpretations of Section 26.9(c) of TCO's tariff in its June 11, 2003 declaratory order supports NES' arguments that TCO was required to install meters at its expense to measure gas received by TCO's pipeline.1 NES further contend that this Court's September 8, 2003 decision, ordering TCO to follow the FERC's ruling and install meters, provides additional support for its argument that it is entitled to summary judgment in its favor with respect to this claim.

Footnote

*1 In its June 11, 2003 declaratory order, the FERC interpreted Section 26.9(b) as requiring TCO to install meters and meter stations to measure gas received into its pipeline, and that the requirement should be complie with. On August 11, 2003, the FERCE accepted TCO's replacement tariff sheets, effective August 11, 2003, whereby TCO was prospectively relieved*

*of any obligation to install meters at its expense to measure gas receive by its pipeline. However, TCO was still required to install meters at its expense if the customer requested installation prior to August 15, 2003. On September 8, 2003, this court ordered TCO to follow the FERC's order and install meters on NGP's wells. When TCO refused to comply, NGP obtained an order from the U.S. District Court for the Eastern Division of Virginia, requiring TCO to install the meters. Upon there FERCE'S December 24, 2003 denial of TCO's request for a rehearing, TCO appealed to the U.S. Court of Appeals for the District of Columbia circuit, alleging the FERC lacked jurisdiction to interpret or enforce the tariff provision.*

On April 15, 2005, the United States Court of Appeals for the District of Columbia Circuit vacated the FERC's declaratory order, holding that the FERC lacked jurisdiction over gas gathering, and thus lacked jurisdiction to interpret a tariff provision with respect to the installation of meters on a gathering system. However, in finding the FERC lacked jurisdiction, the D.C. Circuit Court of Appeals did not address the merits of the FERC's interpretation of Section 26.9(b) of TCO's tariff.

In its August 9, 2005 Motion for Partial Summary Judgment as to Liability on cont III (Breach of Contract) of the Third-Party Complaint, NES maintains it is entitled to judgment in its favor, as West Virginia law mandates that contract interpretation, including whether a contract is ambiguous, is a question of law for the courts. NES contends Section 26.9(b) is not ambiguous as a matter of law, and its plain language requires TCO to install, operate and maintain measuring stations to measure quantities of gas entering its pipeline, unless the parties have otherwise agreed to in writing. NES cities to this Court's September 8, 2003 decision finding that no such written agreement exists that would operate to relieve TCO of its obligations. NES further maintains that TCO's argument, that Section 26.9(b) is trumped by Section 26.9(b) meaningless, which would be contrary to well-established West Virginia contract law that all provisions of a contract should be construed to have meaning.

On October 27, 2005, TCO filed a Memorandum Contra Third-Party Plaintiff Nicole Energy Services, Inc.'s Motion for Partial Summary Judgment. Therein, TCO maintains that the terms of Section 26.9(b) are ambiguous and require resort to extrinsic evidence. Said extrinsic evidence, TCO contends, demonstrates the contract did not require installation of meters. TCO points out the NES' own documents reveal that it conducted an independent review of the wells it purchased, it knew that those wells were un-metered, and was aware that TCO may require it to install meters at its own expense. TCO further maintains that it was not required to install meters, as Section 26.9(m) relieves it from any obligation to entitle to judgment as a matter of law, or in the alternative, because genuine issues of material fact remain with respect to the terms of the contract. TCO further points to Section 26.9 (c) and argues that the parties' agreement anticipated that TCO would not be the sole party responsible for the installation of measuring equipment, and that if the Court interprets Section 26.9(b) as requiring TCO to install meters, NES should be responsible for paying for said meters.

On October 31, 2005, NES filed its Reply memorandum in Support of it s Motion for Partial Summary Judgment as to Liability on count III (Breach of Contract). Therein, NES maintains that all three of TCO's arguments against summary judgment are flawed. With respect to TCO's argument that the parties had an agreement or understanding that relieved TCO of its contractual obligation to install meters, NES maintains the Court has already adjudicated the issue when in its September 8, 2003 decision it held that the parties had no agreement relieving TCO of its obligation to install measuring stations and equipment. With respect to TCO's argument that the contract is ambiguous and requires resort to extrinsic evidence, NES contends that alleged ambiguity, created by the interplay of Section 26.9(b) and 26.9(m), which require TCO to install measuring stations and equipment but do not require TCO to construct any facilities, respectively, in contrary to West Virginia contract law. As specific clauses

trump general clauses, NES argues so Section 26.9(b) trumps Section 26.9(m), thus the only ambiguity is the one created by TCO. Finally the respect to TCO's argument that a factual dispute exists as to whether it has complied with the requirements of Section 26.9(b) by using the "one minute pick up test," NES contends that the only way TCO could comply with the requirements of Section 26.9(b) is by installing meters, which TCO admits it has not done.

The parties attended a status conference on September 21, 2005, at which time they presented to the Court their respective arguments on the remanded issues. Furthermore, on November 9, 2005, the parties appeared in Court for an oral hearing on the pending motion for partial summary judgment as to liability on count III only.

On January 4, 2006, NES filed a post-hearing memorandum in support of its motion for partial summary judgment, where it addresses TCO's argument that NES waived its contractual right to require TCO to install meters. NES maintains it vigorously protested, from the start, "that TCO's flawed method of approximating the production of un-metered wells (monthly one minute pick-up tests with "correction factor") understated the actual production of the un-metered wells." NES further maintains any such waiver, pursuant to the terms of the parties' service contracts, must be in writing and no such writing exists.

## LAW & ANALYSIS

### I. SUMMARY JUDGMENT

Rule 56 of the Ohio Rules of civil Procedure governs the procedure for granting a motion for summary judgment. Before summary judgment bay be granted, a court must first determine that 1.) there is no genuine issue as to any material fact that remains to be litigated; 2.) that the moving party is entitled to judgment as a matter of law; and 3.) that it appears from the evidence that reasonable minds can come to but one conclusion, and that conclusion, when viewing the

evidence in a light most favorable to the party against whom the motion for summary judgment is made, is adverse to the same party. Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327.

Courts have cautioned, however, that "[s]ummary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion." Norris v. Ohio Standard Oil Co. (1982), 70 Ohio St.2d 1, 2-3. (citing to Morris v. First national Bank & Trust Co. (1970), 21 ohio St.2d 25).

In considering motions for summary judgment, courts also need to pay particular attentions to the shifting burdens between the moving and non-moving parties. The moving party bears an initial burden of informing the court of the basis [or its motion and of "indentifying those portions of the record the demonstrate the absence of a genuine issue of material face on the essential clement(s) of the non-moving party's claim." Dresher v. Burt (1996), 75 Ohio St.3d 280, 293. If the moving party does not point to some evidence of the type listed in Civ.R. 56(C), which demonstrates that the non-moving party has no evidence to support its claims, a motion for summary judgment must be denied. Id. However, once the moving party meet its initial burden, the burden then shifts to the non-moving party to bring to the court's attention facts showing a genuine issue for trial, and if this reciprocal burden is not met, summary judgment must be granted. Id.

In determining whether there are genuine issues as to any material facts, courts must examine the applicable substantive law. Miller v. Loral Defense Sys. (1996), 109 Ohio App.3d 379, 383. "A 'material [act' depends on the substantive law of the claim being litigated." Hoyt, Inc. v. Gordon & Assoc.,

Inc. (1995), 104 Ohio App. 3d 598, 603. (citing to Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242, 247-248). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Miller, 109 Ohio App.3d at 383. (citing to Anderson, 477 U.S. at 248).

II CONTRACT INTERPRETATION UNDER WEST VIRGINIA LAW

As Section 5.6 of TCO's tariff provides that the laws of the State of West Virginia govern any disputes arising from agreements between shipper and Transporter, this Court's Interpretation for Section 26.9(b) likewise depends on West Virginia contract law, even though the applicable standard for summary judgment is that of Ohio.

Under West Virginia law, matters involving contract interpretations, including the determination whether a contract ambiguous, fall within the province of the courts. In re Joseph G (w.Va.2003), 589 S.E.2d 507, 511. The Terms of a contract are to be given their plain meaning. Entergy Development Corp. v. Moss (W.Va.2003), 591 S.E.2d 135, 141. "Contract language usually is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of the words employed and obligation undertaken." Supervalu Operations, Inc. v. Center Design, Inc. (w.Va. 1999), 534 S.E.2d 666, 670; Fraternal Order of Police v. Fairmont (W.Va. 1996), 468 S.E.2d 712, 716. "[T] he mere fact that parties do not agree to the construction of a contract doesn't not render it ambiguous." Supervalu, 524 S.E.2d at 670. (citing to Berkeley County Public Service District, etc. v. Vitro Corporation of America (W.Va. 1968), 162 S.E.2d 189). Thus, a contract is deemed ambiguous "when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction. Williams v. precision

Coil, Inc. (W.Va. 1995), 459 S.E.2d 329, 342.

One of those rules of construction pursuant to West Virginia law is that every part of a contract is to be construed so as to have meaning, "and every words of it must be made to operate in some shape or other." Justice v. Stuyvesant Insurance Co. (S.D.W.Va. 1967), 265 F.Supp. 63, 65. (citing to Williams v. South Penn Oil co. (W.Va.1901), 43 S.E. 214). "Where possible, all parts of the contract will be construed as to give force and validity to all of them, and to all the language used." Id. (citing to Rhoades v. Chesapeake & Ohio R. Co. (W.Va. 1901), 39 S.E, 209). Another rule of construction applicable herein is that specific or restricting clauses trump general clauses in a contract. United States use of Westinghouse Electric corp. v. Marietta MfgCo.(S.D.W.Va. 1972), 339 F. Supp. 18, 27.

The Court Finds the language of Section 26.9(b) is not a ambiguous on its face nor is it susceptible to more than one meaning after applying the established rules of construction.
Section 26.9(b) obligates TCO to "install, operate and maintain measuring stations and equipment" so as to measure the gas it receives into its pipeline. TCO maintains the language in question does not unambiguously require it to install meters since Section 26.9(b) even though it may not be specifically identified by name.

TCO further contends the language of Section 26.9(b) is ambiguous in light of the contradictory language found in Section 26.9(m), which reads "Transporter [TCO] shall not be required to construct facilities to provide any services requested hereunder." TCO maintains that, as it is not required to construct any facilities, it cannot be required to install any meters. However, a meter is not a facility. TCO cites to the Merriam-Webster's definition of "facility" as "something that makes an action, operation, or course of conduct easier...[or] something (as a hospital) that is built, installed, or established to serve a particular purpose," and

maintains that, as meters would make measurement easier, they are thus facilities that TCO is not required to construct as per Section 26.9(m). The Court is not persuaded by that argument.

Although a meter may be found in a facility or a measuring station, and is definitely included in the term "measuring equipment," the Court finds that TCO's broad-sweeping definition of facility would render anything and everything that would facilitate measurement a "facility." That is not what the language of Section 26.9(m) envisions, for if it did, it would render Section 26.9(b) completely meaningless, for any measuring station and/or equipment, which by its very nature would facilitate measurement, would then be a "facility" that TCO would not be required to construct. If that were the case, there would be no reason to include Section 26.9(b) in TCO's tariff. As all parts of a contract, where possible, are to be construed and given their plain meaning so that all parts of a contract have some effect, Section 26.9(m) cannot be interpreted in such a way as so render Section 26.9(b) meaningless. Furthermore, as any repugnancies between a general and specific contract clause are to be resolved in favor of the latter, a general clause cannot operate to trump, and in the process render meaningless, and specific clause.

In its memorandum Contra NES' Motion for Partial Summary Judgment, TCO maintains that, "where the Service Agreement states that TCO is not required to construct facilities, that statement includes the construction of meters." However, TCO would not be constructing meters, it would be installing them. The use of the words "install" in Section 26.9(b) and "construct" in Section 26.9(m) provide further insight and support that a kind of measuring equipment, i.e. a meter, which is something to be installed, is not the same as a facility, which is something that ordinarily would be constructed. Thus, while the language of Section 26.9(m) relieves TCO of any obligation to construct any facilities, that same language does not preclude TCO from installing any measuring equipment, including meters, as per Section

26.9(b). if pursuant to West Virgnia rules of contract construction each word is to be given its special meaning and effect, obviously there is a reason the word "install" was used in one section while "construct" in the other, since TCO would not be constructing the meters but merely installing them. Based on the foregoing, the Court finds the terms of Section 26.9(b) are not ambiguous as they are neither inconsistent on their face nor reasonably susceptible to more than one meaning, even in light of the terms of Section 26.9(m), especially in light of the applicable West Virginia rules of construction. 2

Footnote

2) the Court notes that the FERC, in finding that Section 26.9(b) requires TCO to install meters to measure the volume of natural gas received into its pipeline, also found the provision to be ambiguous in part. Nonetheless, and further noting that the FERC's ruling with respect to the interpretation of Section 26.9(b) has been vacated due to the FERC's lack of jurisdiction, the Court finds a portion of its reasoning to be quite enlightening. In its June 11, 2003 declaratory order, the FERC stated that, "[u]nlike other measurement provisions in the tariff, such as for temperature, static pressure, specific gravity, heating value, or gas super-compressibility, this provision does not include provisions explaining what happens if there are not meters. Therefore, the tariff assumes the meters will be installed by Columbia [TCO] at all receipt points unless there is an agreement to the contrary as provided in Section 26.9(b).... Section 26.9(m) only serves the purpose of clarifying that the requirements in Section 26 to install measuring equipment, including the installation of meters and metering stations to measure gas volumes, does not obligate [TCO] to construct taps, interconnects, or pipe facilities necessary to connect production to its system, and was inserted to clarify that the section is consistent with its tariff's construction policy. This interpretation gives meaning to both Section 26.9(b) and (m), moreover, [TCO] would not 'construct' a meter; [TCO] just has to install meters."

TCO cites to extrinsic evidence with respect to the parties' correspondence and understanding of the situation as evidence of a latent ambiguity with respect to the contract language. Specifically, TCO cites to a memorandum from Charles Faulk,

who initially reviewed the wells subsequently purchase by NGP, directed to Freddie Fulson of NGP, indicating that 55 of the 144 natural gas wells were un-metered and that TCO might require NGP to install meters on those wells. TCO further cites to an affidavit by Freddie Fulson indicating that NGP had the option of installing meters, and that the un-metered wells were monitored using the "one minute pickup test," where gas produced by those wells was measure for sixty seconds, and the production value was then adjusted for fluctuations or changing conditions by suing a correction factor. TCO maintains this evidence creates a latent ambiguity with respect to the contract terms, thus requiring resort to extrinsic evidence, which would operate to preclude summary judgment.

However, extrinsic evidence comes into play only if a court, in reviewing a contract and applying all relevant rules of construction, finds the same to be reasonably susceptible to more than one meaning. Thus, "[e]xtrinsic evidence may be used to aid in the construction of a contract if the matter in controversy is not clearly expressed in the contract." Supervalu, 524 S.E.2d at 671. In giving the terms of Section 26.9(b) their plain meaning, the Court does not find that an ambiguity exists with respect to the same. Having previously found that there is no writing between the parties relieving TCO of its obligation to install measuring equipment, the Court finds TCO has not been relieved of that obligation.

Furthermore, the correspondence predates the parties' service agreements, as the Faulk memorandum was dated may 25, 1999, and the parties' Firm Transportation Service Agreement, incorporating by reference the Rate schedule and Section 26.9(b) of TCO's tariff, was effective October 1, 2000. Likewise the other meetings and communications cited by TCO, which also predate the parties' written service agreements, cannot be now used as a means of modifying the plain language of the parties' written agreements, absent any ambiguity in the agreements. As the terms of the parties' service agreements are neither inconsistent

on their face nor susceptible to more than one reasonable meaning after applying the established rules of construction, the extraneous communications cited by TCO cannot operate to create ambiguity and raise factual questions as to the meaning of the terms, thus precluding summary judgment

TCO's flawed circular reasoning with respect to the meaning of "measuring equipment" is further evidenced in its argument that, in the event the Court interprets Section 26.9(b) as requiring TCO to install meters at the un-metered wells, TCO should not be required to pay for those meters in light of the language of Section 26.9(c). TCO cites to Section 26.9(c), which states "[W]here measuring stations and associated equipment are installed by shipper [NES]," and argues that "Section 26.9, therefore, clearly anticipates that there are situations where NES might want to install meters at its own expense." (Emphasis added.). This argument reveals that TCO itself reads "measuring stations and associated equipment" to mean "meters," which is further evidenced by its use of the word "install." The Court notes the pending motion for partial summary judgment deals with liability for failure to install meters and not with the responsibility for the payment of the same. Nonetheless, in applying the above-cited rules of construction the Court finds TCO's interpretation of Section 26.9(c) to be flawed, as it would again render Section 26.9(b) meaningless, for TCO could then avoid its obligation of installing meters by simply refusing to pay for them.

With respect to TCO's argument that Section 26.9(d),(f)-(j) anticipate that some other party will be installing meters in certain circumstances, and thus TCO is not required to install meters at every un-metered well, the Court notes the language in those section s could be applicable in situations where the parties have "otherwise agreed in writing" that someone other than TCO would be installing measuring stations and equipment. No such writing exists between TCO and NES. Furthermore, the Court notes the language of Section 26.11. Although titled "Calibration and Testing of

Meters," the remainder of the section speaks of "measuring equipment" and not once does it actually use the word "meter" in the body of the section, thus further indicating that "measuring equipment" refers to "meters."

Having found that the language of Section 26.9(b) is not ambiguous, the Court must next inquire whether TCO complied with its requirements. TCO maintains that it did comply by utilizing the one minute pick up test, whereby each month gas is measured from the un-metered wells for a sixty-second period. However, as the production value measure gas production for that sixy-second period only, the value is then adjusted for fluctuations and changing conditions over the course of a month by using correction factors. Those correction factors are derived from actual production values of metered wells that are geographically and geologically similar to the un-metered wells. However, Section 26.9(b) requires TCO to "install, operate and maintain measuring stations and equipment by which the volumes of natural gas or quantities of energy received by Transporter are measured." (Emphasis added). It requires TCO to measure the gas volumes, not merely approximate them. By its own admission, TCO did not install meters at the un-metered wells in question, but rather used the one minute pick up test to "measure" the volume of the gas it received into its pipeline. Furthermore, as NES points out, in its Request for Clarificaiton and Rehearing of the FERC's Declaratory Order, TCO sought a rehearing and modification of the order to the extent it obligated it to install "meters and measuring stations;"

NES maintains TCO would not request relief from such a holding if it had complied with its obligation to install measuring stations. NES further maintains that for several years TCO has argued before the courts and the FERC that it should not be required to install measuring stations and equipment at the un-metered wells, as to do so would be unduly burdensome. Accordingly, without any evidence that TCO actually installed, operated and maintained measuring

stations and equipment, and as TCO has not presented any evidence that in order to conduct the one minute pick-up test it was required to install, operate and maintain any measuring stations and equipment at those meters, the Court finds TCO has failed to present any evidence creating a question of fact as to its compliance with Section 26.9(b).

Finally, the Court finds TCO's argument during the November 9, 2005 oral hearing, that NES waived its contractual right to require TCO to install measuring stations and equipment, to be without merit. The plain language of Section 26.9(b) makes clear that nay waiver or deviation from the obligations imposed is to be in writing, and as this Court held in its September 8, 2003 decision, no such writing exists.

Accordingly, and based on the foregoing, the Court herby GRANTS Third-Party Plaintiff Nicole Energy Services, Inc.'s August 10, 2005 Motion for Partial Summary Judgment as to Liability on Count III (Breach of Contract) of the Third-Party Complaint.

**IT IS SO ORDERED**

*"s/'Signature*
*GUY L. REECE, II, JUDGE*

*Copies To:*

*James r. Berendsen, Esq.*
*Bricker & Eckler LLP*
*100 South Third Street*
*Columbus, OH 43215-4291*
*Counsel for Plaintiff*

*James C. Wright, Esq.*
*Karen E. Kahle, Esq.*
*Steptoes & Johnson, PLLC*
*1233 Main Street, Suite 3000*
*Wheeling, WV 26003*
*Cousel for Third-Party Defendant*

*Douglas J. Haynes, Esq.*

*Haynes & Haynes*
*399 East Main Street, Suite 200*
*Columbus, OH 43215*

*Robert C. Sanders, Esq.*
*12051 Old Marlboro Pike*
*Upper Marlboro, MD 20772-2922*
*Special Counsel to Third-Party Plaintiff Nicole Energy Services, Inc.*

*Larry J. McClatchey, Esq.*
*Stewart H. Cupps, Esq.*
*Kegler Brown Hill & Ritter, PA*
*65 East State Street*
*Columbus, OH 43215-4294*
*Chapter 11 Trustee and Co-Counsel to Third-Party Plaintiff Nicole Energy Services, Inc.*

*Marcell Rose Anthony, Esq.*
*233 S. High Street, Suite 300*
*Columbus, OH 43215*
*Attorny for Third-Party Plaintiff Nicole Gas Production, Ltd.*

## APPENDIX E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION – AT COLUMBUS

In re: Nicole Energy Services, Inc.

CASE NO. 03-67484

APPEARANCES:

Larry McClatchey, Esq., Chapter 11 Trustee and Stephanie P. Union, Esq., Counsel for Chapter 11 Trustee;
Frederick L. Ransier, Esq., Chapter 7 Trustee, Brenda K. Bowers, Esq., Counsel for Chapter 7 Trustee;
Lawrence Hackett, Esq., U.S. Trustee's Office;
Freddie L. Fulson, party in interest

BE IT REMEMBERED the above entitled hearing came on to be heard on the 3rd day of September, 2009, before the Honorable John E. Hoffman, Jr., Judge.

TRI COUNTY COURT REPORTING
886 Bradbury Road
Cincinnati, Ohio 45245
513-732-1477

INDEX

| WITNESS | PAGE |
|---|---|
| Larry McClatchey, Esq. | |
| Direct Examination by Ms. Union: | 9 |
| Cross Examination by Mr. Fulson: | 31 |
| Examination by the Court: | 40 |
| All Trustee Exhibits admitted | 20 & 43 |

THE COURT: Good afternoon. We're before the Court this afternoon to consider confirmation of a liquidating plan proposed by the trustee in the Nicole Energy Services, Inc. case which is Case Number 03-67484. May I have appearances of counsel and other participants please?

MR. McCLATCHEY: Good afternoon, Your Honor. I'm Larry McClatchey. I'm the trustee in the Chapter 11 case and my firm represents me generally. With me at the counsel table is Stephanie Union from my office.

THE COURT: Good afternoon.

MS. BOWERS: Good afternoon, Your Honor. Brenda K. Bowers and Frederick L. Ransier of the law firm of Vorys, Sater, Seymour & Pease. Mr. Ransier is the Chapter 7 Trustee in the cases of Nicole Energy Marketing, Inc., Nicole Gas Marketing, Inc. and Nicole Gas Production, Ltd.

THE COURT: Thank you, Ms. Bowers.

MR. FULSON: Good afternoon, Your Honor. Freddie L. Fulson, party in interest.

THE COURT: Good afternoon, Mr. Fulson.

MR. HACKETT: Good afternoon, Your Honor. Lawrence Hackett on behalf of the U.S. Trustee.

THE COURT: Good afternoon, Mr. Hackett. Alright, Mr. McClatchey, you may proceed.

MR. McCLATCHEY: Thank you, Your Honor. This case was commenced originally by the filing of an involuntary bankruptcy petition, subsequently converted, and has proceeded as a Chapter 11 case. I've been serving as the trustee.

In February I filed a proposed Chapter 11 plan of liquidation, I filed a disclosure statement and I filed a proposed ballot. After some continuances, there was a hearing conducted and an order was entered approving the disclosure statement on May 27, 2009. On June 4th I sent out the plan of liquidation, the disclosure statement, the order approving the disclosure statement and the ballot and I filed a certificate of service on June 4th. On the 16th of June Mr. Fulson filed an objection to confirmation of the plan. On July 2nd I filed a certification of the ballots after the period for voting on the plan had expired. On July 6th I filed a witness list and exhibit list for today's ... for the hearings. I did not receive a witness list or an exhibit list from Mr. Fulson.

At the request of Mr. Ransier, the confirmation hearing was continued until today to give him an opportunity to review the interrelationship of the companies and the plan and disclosure statement a little more thoroughly from his point of view. And on August 28th I filed a memorandum of law in support of confirmation of the plan which sets out most of the law in the area on the various issues. And I don't intend to review all of that today but would be happy to answer any questions that Your Honor has about it.

We're here, basically, to seek approval of my plan to continue the liquidation of Nicole Energy Services, the principal goal being to obtain Court authority to make a significant distribution to creditors who have been waiting for some period of time for that. We have prepared some testimony to present in support of confirmation and we have provided the Court with copies of the exhibits. I would point out that almost all of the exhibits are taken from the record in the case of a related case.

THE COURT: Alright, very well. Thank you, Mr. McClatchey. Ms. Bowers, anything by way of preliminary statement?

MS. BOWERS: Your Honor, as I indicated, Mr. Ransier is the Chapter 7 Trustee for Nicole Energy Marketing, Inc.,

Nicole Gas Marketing, Inc. and Nicole Gas Production, Ltd. I'm going to refer to all those companies as the Chapter 7 debtors.

The creditors' meetings in those Chapter 7 cases occurred on June 29th of this year. At that time the confirmation hearing for this matter was originally scheduled for July 13th. Since this case involves the Chapter 7 companies and also involves a vast amount of pleadings, hearings and objections, we asked the trustee in the Chapter 11 case if we could have additional time in order to review those pleadings to determine if any of the Chapter 7 companies had a reason to object or had a position to take regarding this confirmation hearing. That continuance was granted until today. And in the time that's passed, the trustee has reviewed as many of the pleadings as he can. The trustee and I have conducted the deposition of Mr. Fulson. We have contacted other counsel that have been involved in this case. We've had a meeting with Mr. McClatchey or several conferences with Mr. McClatchey. We've reviewed the objections that have been filed, and we've reviewed the claims that have been filed, or the claims that have been asserted as being in existence, for the Chapter 7 entities. We've also reviewed the impact of the sale and asset purchase agreement and the substantive consolidation adversary that's pending in this case.

Since the meeting of creditors, the Chapter 7 trustee has done all of those things. And based upon that review, at this point the Chapter 7 trustee has determined that Nicole Gas Production entities, the Chapter 7 entities, do not have a basis upon which to object to the plan that has been proposed. We have determined that within the Chapter 11 proceeding before the Court today, Nicole Gas Production, Ltd. was listed as an unsecured creditor in this, but it was listed as an unsecured creditor with an unliquidated claim.

In reviewing the claims register, there was no claim that was ever filed by any of the Chapter 7 entities in a timely fashion within this case. The Chapter 7 trustee is limited by the

things that occurred before he was appointed as the Chapter 7 trustee and at this point the only thing that I believe that the Chapter 7 trustee would ask is that this Court recognize in any order, if an order is entered confirming this case, recognize that no claims of the Chapter 7 entities, whether against the Columbia Gas entities or any other entities, have been settled or taken care of by the asset purchase agreement. That those claims are still claims that the Chapter 7 trustee will be able to prosecute.

And in speaking with Mr. McClatchey, I believe he's in agreement with that. And that's basically where the Chapter 7 trustee stands in this matter.

THE COURT: Alright. Thank you, Ms. Bowers. Mr. Hackett.

MR. HACKETT: Good afternoon, Your Honor. As the record in this case reflects, the U.S. Trustee did not file an objection or any papers with respect to the liquidating plan and we do not oppose confirmation of the liquidating plan. Thank you.

THE COURT: Alright, thank you, Mr. Hackett. Mr. Fulson, any preliminary statement from you?

MR. FULSON: Yes, Your Honor. I filed an objection against this confirmation plan and I did not provide exhibit lists based on the facts that I had already filed exhibits with my objection plan and so, therefore, I'm relying upon my filing of my objection plan against the confirmation hearing.

THE COURT: I'm sorry, I don't understand your point. You filed the witness and exhibit list when?

MR. FULSON: I filed an exhibit list with my objection plan motion.

THE COURT: You attached certain exhibits to your objection to confirmation?

MR. FULSON: Yes, yes.

THE COURT: Alright.

MR. FULSON: And I would like to rely on that.

THE COURT: Alright. Mr. McClatchey.

MR. McCLATCHEY: Your Honor, I have copies of those documents and I don't have any objection to those, if he wants to rely on those.

THE COURT: Very well. Thank you, Mr. Fulson. You may proceed then, Mr. McClatchey, with your evidence.

MS. UNION: I would like to call Mr. McClatchey to the stand.

THE COURT: Thank you, Ms. Union. Mr. McClatchey, if you could step forward and be sworn please?
(Witness duly sworn)

DIRECT EXAMINATION

BY MS. UNION:

Q Good afternoon. Could you please state your name and business address for the record?

A My name is Larry McClatchey and I have an office at 65 East State Street, Suite 1800 here in Columbus.

Q And are you currently serving as the trustee in the Nicole Energy Services, Inc. case?

A Yes, I am.

Q Are you the proponent of the plan of liquidation that's up for confirmation today?

A Yes.

Q On June 4th of 2009 did you cause the plan, disclosure statement and supplements, the approved ballots and

a copy of the order approving the disclosure statement and setting the hearing to be served on all the parties in interest?

A Yes, I did, in conformity with the Court's order.

Q Did you also compile the ballots in accordance with the order?

A I collected the ballots and compiled them, yes.

Q Did you file any sort of a certification of the ballots?

A Yes, I filed a certification with the Court in compliance with the Court's order and rules.

Q Did all classes that were provided for in the plan accept the plan?

A No, the plan proposes to cancel the interest of the equity security holders and that class is deemed to have rejected the plan. All the other classes affirmatively accepted the plan.

Q And did each holder of an allowed claim accept the plan?

A All holders of allowed claims filed ballots accepting the plan except Michigan Consolidated Gas which did not vote at all.

Q Have you complied with all the applicable provisions of the Code and applicable court orders in the process of seeking confirmation of the plan?

A Yes, I have.

Q And in your judgment, is the plan intended to achieve a result that's consistent with the objectives and purposes of the Code?

A Yes. What the plan contemplates, essentially, is the liquidation of the assets of the estate just as if the case were being liquidated in a Chapter 7 proceeding which is obviously a purpose and goal of the Bankruptcy Code.

Q And as a proponent of the plan, did you make any promises or offer any improper inducements to creditors in order to gain acceptance of the plan?

A No, other than contacting creditors and asking them to return their ballots, I had no conversations with anyone about the plan.

Q Does the plan provide that all administrative expenses are subject to Court approval as reasonable?

A Yes, the plan contemplates that all administrative claims will be based upon application and Court order allowing the claim after appropriate notice.

Q And does the plan contemplate any operations of the debtor after confirmation?

A No. The debtor hasn't been in operation since 2003.

Q Will anyone other than yourself serve as the manager or agent of the debtor during the liquidation?

A No.

Q And will you employ any insider of the debtor in any capacity?

A No, I have not and I will not.

Q Is it necessary under the plan for any government regulatory agency or commission to approve rates to be charged by the reorganized debtor?

A No. Since the debtor is not operating, there are no regulatory approvals required.

Q Has the holder of each allowed claim in each impaired class accepted the plan?

A No. As I indicated earlier, Michigan Consolidated Gas did not affirmatively vote on the plan to accept it.

Q And can you tell me which holders of the claims or interest did not accept the plan?

A As I said, there's Michigan Consolidated and also the interest owners in Class 4 are deemed to have rejected the plan since their interests are being cancelled.

Q And who is that or what entity is that?

A Nicole Energy Marketing, Inc. is the shareholder of the debtor.

Q And as to Michigan Consolidated and Nicole Energy Marketing, Inc., does the plan provide that each will receive under the plan the same value that they would receive in a liquidation under Chapter 7 of the Code?

A Yes, I believe so.

Q Has any argument been advanced that holders of allowed claims would receive more on account of their claims in a Chapter 7 liquidation?

A No. I'm not aware of any such argument and I am a Chapter 7 trustee and I don't know of any improved position that any creditor could obtain by converting the case to a Chapter 7 proceeding at this time.

Q Has each class accepted the plan?

A Except for the class that's deemed to reject, yes.

Q And which class has not accepted the plan then?

A Class 4.

Q And has at least one impaired class accepted the plan?

A Yes.

Q Does the plan provide for payment of all administrative and priority claims in accordance with the Code?

A Yes. You mean in terms of priority, yes.

Q And if the plan is confirmed, do you intend to pay all fees that are due under 28 USC § 1930 in accordance with the plan provisions?

A Yes. I believe all of the U.S. Trustee fees have been paid to date based upon distributions and the plan contemplates that they would be paid until the case is finally closed.

Q Thank you. The plan proposes liquidation so are there any circumstances or contingencies known to you that would prevent completion of the liquidation as it is planned?

A No, there is nothing in the plan that could be influenced by any outside parties in terms of contingencies. There are no approvals required from anybody. The plan does not propose any additional compromises or any ... there's no contingencies. It's simply a matter of the trustee winding up the administration.

Q In your judgment then does the plan provide adequate means for you to carry out the proposed liquidation?

A Yes. The plan provides that in my capacity as trustee I'll retain all the rights, causes of action, powers that I would have either as Chapter 11 trustee or as a hypothetical Chapter 7 trustee. And I believe those means are adequate to complete the winding up of the affairs of the estate.

Q You've indicated in your testimony here that not all claims in interest have accepted the plan. Have you requested that the Court nevertheless confirm the plan under the so-called cram-down provisions of 1129(b)?

A Yes. There is a written request for that in the plan itself.

Q And can you tell the Court again which class did not accept the plan?

A The holders of interest in Class 4 are deemed to have rejected the plan.

Q And then what does the plan propose for that class?

A The plan proposes that the interest of the shareholders will be cancelled and they will receive or retain no property under the plan.

Q And in your judgment, does the plan discriminate unfairly with respect to the holders of debtor's common stock?

A No, because in my opinion, outside of the bankruptcy forum the shareholders have lower priority claims against the company than do the trade creditors and, therefore, that discrimination between those two classes is not unfair.

Q And is there any class of claims or interests under the plan that would be junior to the Class 4?

A No.

Q Do you contend that the plan is fair and equitable as to Class IV?

A I believe it is.

Q Can you tell the Court who owns the equity interest of the debtor, please?

A Yes. Nicole Energy Marketing, Inc.

Q And is this reflected in the list of equity security holders that was filed by the debtor?

A Yes.

Q I turn your attention to Trustee's Exhibit 1. I believe copies have been provided to both the witness and the Court.

A Yes, I have it.

Q Can you tell me is this a copy of a portion of the debtor's

list of equity security holders and Schedules D and E?

A Yes. This is a copy of the list of equity security holders and the schedules that show secured and unsecured claims. This was filed April 14th of 2004 and, as far as I know, there was never any attempt to amend these schedules.

Q And did the debtor list Freddie L. Fulson as a creditor or shareholder in its statements and schedules?

A No.

Q Did the Court set a bar date for creditors and parties in interest to file claims?

A Yes.

Q Can you take a look at Exhibit 2 please?

A Yes, I have it.

Q Can you identify that please?

A This Exhibit 2 is a photocopy of the order fixing proof of claims bar date that was entered April 26, 2004 in this case setting July 15, 2004 as the last day for filing proofs of claim or interest.

Q And if you could, turn to Exhibit 3, Trustee's Exhibit 3, and identify that as well?

A Trustee's Exhibit 3 is a photocopy of a printout of the official claims docket maintained by the Clerk showing all claims that were filed, claims and interests that were filed as of July 6, 2009. This was originally prepared in anticipation of the last scheduled hearing date. And as far as I know there have been no additional ... there hasn't been anything additional filed since July 6th.

Q So then to the best of your knowledge, that would reflect all of the proofs of claim filed as of July 6, 2009?

A Yes, this is the list that I relied on in my case administration.

Q Okay, and can you tell me whether either Mr. Fulson or any of the affiliates of the debtor filed a timely proof of claim?

A They did not.

Q Does Mr. Fulson or any of the debtor's affiliates hold an allowed claim against the debtor?

A They do not.

Q Did you file the report required by 1106(a)(6) of the Code after your appointment?

A Yeah. You're referring to, I believe, the trustee's duty to file a report with the Court and I did, in the initial months of the case, file a report indicating that I did not think I would be able to file a plan of reorganization but that I thought that there would be a potential for liquidation and distribution to creditors from the prosecution or settlement of the state court case against Columbia Gas Transmission.

Q And does the record in this case reflect any restriction on Mr. Fulson or any of the debtor's affiliates that would have prevented a party other than yourself from filing a reorganization plan of the debtor in this case?

A No. I didn't go back and do the calculations but at some point the exclusivity period for the debtor would have terminated. And as far as I know no attempt was ever made by Mr. Fulson or any of his companies to develop a plan, an alternative plan for the debtor. But there was no restriction on his ability to do so.

Q And can you tell me whether, as far as you know today, has Mr. Fulson exhausted his appeals of the order approving the sale of the claims against TCO that was entered in April of 2008?

A As far as I know, yes. There are two things that I'm uncertain about. At the time of the 341 Meeting in the Chapter 7 cases that Ms. Bowers referred to, Mr. Fulson did provide me with a copy of what appeared to be a petition for a writ of certiorari to the United States Supreme Court. We have tried to follow up on that and have found no record that it was actually filed with the Supreme Court. Also an emergency motion had been filed by Mr. Fulson in the Sixth Circuit Court of Appeals, I believe, back in April. Earlier this week the Sixth Circuit put on an order denying that request for relief. They had treated it as a motion for an en banc rehearing and as far as I know that exhausts all the potential appeals from the sale order.

Q Thank you. Have you examined proofs of claim filed

by each of the holders of allowed claims provided for in the plan?

A I did.

Q And did you request and obtain from them any additional information that you deem necessary to evaluate those claims?

A Yes. Early in my case administration I contacted all the creditors who had filed claims and asked them to provide backup documentation for the claims. I also had access to materials that had been prepared originally by the petitioning creditors to support litigation in the involuntary case. A lot of that material included copies of judgment entries and things that substantiated the claims.

Q And can you tell me in general what conclusions you reached with respect to all of the allowed unsecured claims?

A I examined the proofs of claim that had been filed, I objected to a few. I had one allowed claim that I asked the Court to re-characterize, which the Court did. And attached to the disclosure statement as Exhibit A is a list of the holders of what I believe to be the allowed claims against this estate.

Q Can you tell me if you believe the plan complies with all the requirements under § 1129 with the exception of 1129(a)(8)?

A I believe it does.

Q And as to holders of claims in interest that have not accepted the plan, do you believe that the plan does not discriminate unfairly and that the plan is fair and equitable?

A I believe it is.

Q And would you request that the Court confirm the plan of liquidation that was filed on February 6 of 2009?

A Yes.

MS. UNION: I would like to move to admit Exhibits 1 through 3.

THE COURT: Alright, any objection to the admission of Trustee's
Exhibits 1 through 3? Hearing none then the exhibits will be admitted without objection.

MS. UNION: Thank you, Your Honor. I have no further questions.

THE COURT: Thank you, Ms. Union. Any questions for the trustee, Ms. Bowers?

MS. BOWERS: No, Your Honor.

THE COURT: Mr. Hackett?

MR. HACKETT: Nothing, Your Honor. Thank you.

THE COURT: Mr. Fulson.

MR. FULSON: Yes, I have questions for Mr. McClatchey.

CROSS EXAMINATION

BY MR. FULSON:

Q Mr. McClatchey, my first question is in regards to Exhibit 2, your Exhibit 2.

A Yes.

Q Are you aware or not aware as to whether or not this document was mailed to all parties, including parties in interest, or do you have knowledge as to whether or not this was a certified copy sent to the party in interest?

A I am not responsible for and I did not serve the order fixing the proof of claim bar date myself. It's my understanding though from the rules and from my experience with the Court that the order fixing a proof of claims bar date is served by the Clerk's Office on all parties that are on the service list for the case. And I did not check it but I suspect if we looked at the docket we would find that there is a certification by the Clerk of the mailing of this order to parties in interest. Also

it would have been served on all of the attorneys of record for any of the affiliated ... debtor's affiliated companies.

Q At this point, since I'm the party in interest, I can't say I have received this document and this is the first time I've seen it.

A Is that a question? I'm not ...

Q That's a statement and I'm trying to ...

THE COURT: Well, you're not permitted to make statements now. You can make a statement in argument. You can ask the trustee a question though, Mr. Fulson, if you have one.

MR. FULSON: I'm aware but the statement is related to the question.

THE COURT: Well, okay, just ask questions though. Confine yourself to asking questions, please.

MR. FULSON: Okay, thank you.

Q My next question is, Mr. McClatchey, is in relationship to the creditors' list in reference to Columbia Gas being a Class 3 participant. I don't recall or I'm asking you this question; do you recall the date or a court order that we received that approved Columbia as a creditor?

A Well, first of all let me clarify for you. If you're talking about the plan. I assume you are. Under the plan, the Columbia entities are placed in a separate class because those claims were subordinated under the Asset Purchase Agreement. That's called Class 3-S under the plan. There has been no order entered in the case determining one way or the other whether the claims of the Columbia entities are allowed claims, if that's your question. I did not file a formal objection to those claims because it was unnecessary to do so since the claims were being subordinated to claims of trade creditors.

Q Then let me ask the question this way. Were Columbia allowed to vote on this confirmation plan with a ballot?

A Yes.

Q And why were they allowed?

A Because they had filed timely proofs of claim. If you look at Trustee's Exhibit No. 3, Mr. Fulson, you'll find that all four of the Columbia entities filed timely proofs of claim.

Q Previously in the case we filed a number of objections in reference to the Columbia claims and my original question was were there ever a court order that allowed Columbia to be a creditor? To have a proof of claim would mean that they would be an authorized creditor, is that correct?

A The way the definitional ... the way the Bankruptcy Code is set up and the way the plan is structured, only holders of allowed claims are entitled to vote. As I said earlier, there is not an order disallowing the Columbia claims nor is there an order allowing the Columbia claims.

Q So how were they allowed to vote?

A Well, as I said, they're entitled to under the statute and under the plan because they filed a timely proof of claim. It was not the subject of any objection as of the date the voting took place.

Q The fact that we have not had a conclusion to the Columbia claim, and they filed a claim against Nicole Energy Services, Inc. for $5,000,000, that's a very critical amount of money. And since they have three LDCs casting a vote to approve the confirmation plan, I think it's very critical or I need to know why they have been, their proof of claim has been recognized.

A I believe I've answered that question. Their claim was recognized because they filed a timely proof of claim and they were entitled to vote on the plan.

Q So isn't a proof of claim supposed to be evaluated to see whether or not it's a legitimate claim?

A I evaluated those claims. But as I said earlier, it

wasn't necessary to file objections to any of those claims and I don't think it will ever be necessary to evaluate those claims because they were subordinated under the asset purchase agreement. In essence, Mr. Fulson, the way I would explain it is it's as if they had no claims. Because I can't foresee any circumstance under which there would be funds in the estate to pay to the Columbia entities.

Q But if an entity does not have a claim, does that mean that they still have a right to vote, to cast a ballot, in the confirmation hearing over liquidating a company?

A Did you say if an entity does not have a claim?

Q Yes.

A If an entity does not have an allowed claim, they would not be permitted to vote under the plan.

Q Well, if Columbia is subordinating they're supposed to be claim and they issued a proof of claim and you accepted their vote in the Class 3 ballot, why is that?

A Well, first of all I don't accept a premise in your question. As I said before, the Columbia claims were in Class 3-S. In my judgment, it wouldn't matter one way or the other whether they voted or not, the plan would still be confirmable under § 1129 under the circumstances of this case.

Q Mr. McClatchey, let's change the subject to good faith, the good faith of the trustee. And in the process of your document I received on August 28th you said that there was no sign of discrimination in this case. What did you mean by that?

A One of the requirements, one of the things the Court must consider in a case like this under § 1129 of the Bankruptcy Code is whether the plan discriminates unfairly among classes. I believe the applicable case law discusses unfair discrimination in terms of treating creditors who are in the same relative relation to the debtor in some different way and in a way that's unfair to one class. That's the discussion ... you're referring to my memorandum in support of confirmation, I believe, and that's what I discussed in

the legal memo.

Q Let's take it a little bit further then. The Peoples Gas, Equitable Gas were all at the beginning of this case when Nicole Energy Services, Inc. filed for its involuntary Chapter 11. They listed all those creditors as disputed claims. What process did you take to certify that each one of those disputed claims were legitimate claims? In other words, who did you consult with that knew something about these claims that can give you full explanation as to what those claims represent?

A If your question was ... well, as I indicated earlier, I contacted the creditors early in the case and asked them to provide backup documentation for their claims. In most cases, as I testified at the trial in May of 2007, in most cases the creditors had obtained judgments against the debtor. There were a few other creditors who had filed claims based upon gas sale contracts who provided copies of the contracts and then invoices that had been issued to the debtor that supported the amounts of the claims.

Q I think that I need to rephrase my question because I think that what you just said is different than one question. I asked you about the disputed claims and I identified Peoples Energy, Equitable Gas as disputed claims. And my question basically is that did you consult with a debtor representative as to why it was a disputed claim?

A No, I did not, Mr. Fulson, because in my judgment the debtor did not dispute claims in good faith. If you look at the statements and schedules that were filed by the debtor, I believe there was only one trade creditor that was not listed as either disputed or unliquidated and I don't believe that that was a good faith filing by the debtor.

Q And what claim was that?

A It was the claim of Perry Gas.

Q And what happened with the others?

A Well, Mr. Fulson, I know you're not an attorney but

the way the process works in a Chapter 11 case is that the debtor gets the first opportunity to list its creditors in the statements and schedules, and the debtor has the right to list a creditor as being either disputed, contingent or unliquidated. Once the debtor exercises that privilege, then it's up to the creditor to determine whether the listing of the claim is correct as to the amount and as to the status of the claim and the creditor has the right to file a proof of claim.

In this case, all of the creditors ... well, let me say it this way. In this case, a number of the creditors that were listed as disputed ... where the claims were listed as disputed or unliquidated, did avail themselves of the right to file and did file proofs of claim. At that point, under my understanding of the rules, they're deemed to be allowed claims unless they're objected to.

Q Didn't the debtor object to those claims?

A The debtor ... well, I'll answer the question this way. Yes. After the proofs of claim were filed, the attorney for the debtor did file what was called a motion to value all allowed claims or something, words to that affect. The matter was set for hearing and a day or two before the hearing the motion was withdrawn without any explanation.

Q That was filed by?

A Mr. Pettigrew.

Q Let's change the subject and ask about your voice message that was interpreted by Attorney Sanders in reference to his confirmation as attorney. Why was Mr. Sanders removed as the attorney for Nicole Energy Services, Inc.?

A Why was he removed as attorney?

Q Yes.

A I don't understand what you mean. I hired him as special counsel.

Q During the course of the action, and I don't recall the exact date, but Columbia filed with this court a motion

to have Mr. Sanders in a class of being in conflict of interest as representing all of the Nicole companies. And as the trustee, you assisted with the fact that he could not represent the other Nicole companies, namely Nicole Energy Marketing, Inc., Nicole Gas Production, Nicole Gas Marketing, Inc., and he could only represent Nicole Energy Services, Inc. And your statement was, "Once he had completed the Nicole Energy Services, Inc. case, that he could resume representing those other entities." And my question is, his conflict of interest denied us the representation of a lawyer in this court. And I want to know why was he in conflict?

A Mr. Fulson, I filed an application, I don't have the docket in front of me, but sometime, I believe it was in February of 2005 probably. I filed an application to employ Mr. Sanders as special counsel. And you're right, the Columbia entities did not object but they filed a statement saying we're a little concerned here because we think there might be a conflict of interest. Mr. Sanders filed then a supplemental affidavit explaining his relationship to some of the affiliated companies, the ones that you mentioned. The Court then conducted a hearing on Columbia's objection in this courtroom. Mr. Sanders participated in that hearing by phone. And as I recall, during the course of the hearing the Court asked Mr. Sanders a specific question relating to his employment and asked him whether he understood that during the time he was representing me he would not be allowed to represent any of the other Nicole entities, and he said he understood that. And that is not because of any command or wish on my part, Mr. Fulson, that's because under the Bankruptcy Code, as I understand it, were he to represent an interest that had an interest adverse to the estate while he was representing me, he could be denied compensation and, of course, he did not want to take that risk.

You have produced a memorandum or a writing of

a voice mail message I left for Mr. Sanders. I don't recall exactly the circumstances but I believe that that message was left for him around the time that this issue had come up with Columbia, and my message to him was basically confirming what I had talked with him about in terms of his requirement to remain free of any conflicts of interest while he was representing me.

And there was one occasion while he was representing me when I did consent to allowing him to proceed with some legal work in favor of, I believe it was Nicole Gas Production. It had to do with when the order requiring Columbia to put meters on the wells was vacated by the court of appeals, Columbia went back into the United States District Court in Virginia and asked the judge to cause the bond that, I believe, Nicole Gas Production posted, to be forfeited. And Mr. Fulson called me and asked for permission ... I'm sorry, Mr. Sanders called me and asked for permission to file an emergency appeal. I reluctantly said it was okay for him to do that under the circumstances and given the time constraints. As far as I know that's the only instance in which he represented any of the Nicole entities while he was representing me, and that was with my permission.

Q In your voice message that he transcribed, you said that you were not aware as to what you were going to do with the fraud, fraudulent transfer and veil-piercing complaint that you had against the other entities and myself personally. What did you mean by that?

A Well, I haven't seen the actual message for some time so I'm doing this from memory. But the issue that I would have been discussing with special counsel was the issue of whether I was adverse, whether in my capacity as trustee for Nicole Energy Services, I was adverse to any of the other Nicole entities which would have been Nicole Gas Production, Nicole Gas Marketing, Nicole Energy Marketing and yourself.

Q Adverse? What do you mean adverse?

A A conflict of interest. I would have a claim against you for money or against one of the other companies.

Q What happened to the fraud, fraudulent transfer and veil-piercing complaint?

A What we refer to as the substantive consolidation case was filed shortly before the statute of limitations expired and is still pending on the docket of this court.

Q Isn't the fraud and fraudulent transfer and veil-piercing case related to the asset purchase agreement?

A The only way it's related to the asset purchase agreement is that part of the detail in the agreement included reserving to myself the right to decide what to do with the substantive consolidation case on a going-forward basis. The agreement also contemplates that legal fees and expert witness fees and so forth in connection with that case would have to be advanced by the Columbia entities because, as you recall, under the asset purchase agreement and also under this plan, if there is a recovery in that action, the Columbia entities retain their rights to participate in any dividend that comes from any asset recovery in that case. So it's related to the asset purchase agreement in that way.

Q In Clause 3.02?

A I don't have the agreement in front of me right now.

Q I have it from memory. It's 3.02 and it states that the trustee will pursue all avenues against Nicole Energy Marketing, Nicole Gas Production, Nicole Gas Marketing, Inc. and Freddie L. Fulson and that Columbia will cover any outside costs to recover any types of revenue from that fact. Isn't it true that the reason why Columbia subordinated their claim is because they have the intent to try to liquidate Nicole Energy Marketing, Inc. and Nicole Gas Production and Nicole Gas Marketing, Inc. through the trustee process?

A I can't speak to what Columbia's motivation is. I can tell you that the reason that they agreed to subordinate their claims the way they did is because that's what I

demanded in terms of the settlement.

Q Well, didn't you write in the trustee's last report the same words, that the trustee was going to pursue all avenues against Nicole Energy Marketing, Inc., Nicole Gas Production, Nicole Gas Marketing, Inc. and Freddie L. Fulson?

A Well, Mr. Fulson, that's still my intention. I'm not sure what that's got to do with the hearing here today but that's provided for in the plan also.

Q That's in your confirmation report?

A You mean in my memorandum of law refers to that?

Q Yes.

A Okay, that could be.

Q You made that statement. So why is that?

A Because it's my statutory duty to do that.

Q My question then is going back to if Columbia's claim was objected to from the beginning when they filed the voluntary Chapter 7 to bring the case from the state court to this court and we objected to it and to their claim and we still object to it, why is it that they are allowed to subordinate, with your assistance, in an effort to bring and liquidate Nicole Energy Services, Inc. and attempt to bring something, further charges against Nicole Energy Marketing, Inc. and Nicole Gas Production and Nicole Gas Marketing? Why is that?

A Well, I don't know that I understand that question.

Q Should I try it again?

A The reason that they're allowed to subordinate is because it was their choice to agree to that in order to achieve a settlement of the state court case. The reason that they're allowed to ... in my opinion, the reason that they're allowed to support and actively participate in the substantive consolidation case is because, under my agreement with them, if there's a recovery in that case they may share in that recovery with other creditors of the estate.

Q Did you make these decisions on your own, Mr. McClatchey?

A Absolutely.

Q What happened to the creditors' committee?

A The creditors' committee is still organized, it's still on the ... it's still viable as far as the U.S. Trustee's Office and as far as the docket of the case reflect. There was one member that resigned of the original five, but the other four would still have standing in my opinion. There has been no activity recently other than periodic reports from me as to the progress in the case.

Q Mr. McClatchey, how do you explain the fact that AGF, Enron sent letters in response to the U.S. Trustee, Larry Hackett's letter of conflict of interest. AGF stated that there was no creditors' committee and Enron said that there was no creditors' committee, that it was all left up to you. And the rules I've read that we're supposed to have a creditors' committee. Why would they make that such statement that there would be ... there was no creditors' committee, particularly AGF who intervened in the case?

A Mr. Fulson, your question assumes a bunch of facts which are not only not in evidence but they're incorrect. You contact ... once you ... my recollection is that when you found out that the creditors' committee was going to support the settlement with Columbia Gas Transmission, you contacted the U.S. Trustee's Office and you asserted that because members of the creditors' committee must have been in business with Columbia there had to be a conflict of interest.

I found out about this ... I believe the trustee made the appropriate ... the U.S. Trustee's Office made the appropriate response which is they contacted the members of the creditors' committee and requested information about your allegation. The U.S. Trustee's Office did not tell me about doing that and that's perfectly okay. I found out about it when a couple of the members of the committee contacted me and wanted to know what the questioning was about.

I didn't see all of the letters that the U.S. Trustee's

Office received back but there was an attorney out of New York representing Enron who knew nothing about the case and nothing about the creditors' committee and who had not contacted Ed McMichael, who was the representative of Enron on the committee, who did write a letter that you have filed in the court on several different occasions, in which he made the assertion that there was no creditors' committee and that the settlement was a fait accompli presented by the trustee, or words to that affect. That statement in that letter is simply wrong. That lawyer didn't contact me. And this issue came up at the time of the hearing on the approval of the sale motion if you recall and the Court had testimony from Ed McMichael on the creditors' committee. It was quite obvious that there was a functioning creditors' committee in the case. There were minutes of the creditors' committee meetings which were exhibits at the trial we had in May of 2007.

Q So, Mr. McClatchey, you said first that I jumped on the ship to get this information. And when I received the letters, and I want you to know I did receive the letters from the United States Freedom of Information Act, is that correct?

THE COURT: Mr. Fulson, I'm not going to allow any more testimony along these lines. Way back when, at the time I reluctantly sustained your objection to a motion to allow a distribution to the creditors in this case because I was concerned about the cost involved with the disclosure statement and plan, I admonished you at that time that we were not going to allow the disclosure statement hearing or the confirmation proceedings to revert to round two or three of the matters that were litigated in the three-day hearing and that were the subject of a ninety-five page opinion of this Court that has been appealed through the Sixth Circuit and beyond. So if you have any other questions that are germane to confirmation, you may proceed but ...

MR. FULSON: These are related to the confirmation.

THE COURT: ... you're plowing ground that has already been the subject of an opinion of this Court and it's been appealed.

MR. FULSON: I just asked you earlier to accept my objections as my exhibit list. And my exhibit list include the letters from each one of the people ...

THE COURT: And that matter has been addressed.

MR. FULSON: ... on the commented. So you're saying that we can't use them?

THE COURT: Mr. Fulson, those matters were addressed.

MR. FULSON: Is that what you're saying?

THE COURT: That's what I'm saying.

MR. FULSON: Yeah, well.

THE COURT: So do you have anything further that relates to confirmation?

MR. FULSON: That's all related to the confirmation ...

THE COURT: In your view, Mr. Fulson.

MR. FULSON: ... and I objected to it.

THE COURT: In your view, Mr. Fulson. In your view, Mr. Fulson.

MR. FULSON: I object to your motion. I object.

THE COURT: Object to what?

MR. FULSON: I object to you not allowing me to ask him questions because the creditors' committee ...

THE COURT: Your objection is so noted and it's overruled.

MR. FULSON: The creditors' committee is very important here.

THE COURT: Your objection is so noted and it's overruled.

MR. FULSON: I would like to offer proof, make a record on this matter in case of appeal.

THE COURT: Mr. Fulson, I admonished you earlier that we're not going to re-litigate in this matter objections that were raised to the sale. That's what you're attempting to do. So I'll not permit you to make an offer of proof with respect to a matter that's not germane to confirmation.

MR. FULSON: Well, Your Honor, I'm sorry, with all due respect but this is all related, it's all intertwined.

THE COURT: In your view, Mr. . . . .

MR. FULSON: And you can't separate anything here that wasn't related earlier. The creditors' committee was important because the rule says you have to have a creditors' committee in the confirmation hearing in order to liquidate a company. And so the creditors' committee did not exist, it had a conflict of interest and that's the point I'm trying to make.

THE COURT: And you made that point, and your attorney has made that point as an argument in opposition to the proposed sale. That point was overruled. That point has been appealed. So that's why I will not permit any further questioning along those lines. Nor will I permit you to make an offer of proof with respect to a matter that's been litigated

and disposed of. Do you understand?

MR. FULSON: I understand and I object.

THE COURT: Alright, so do you have any other questions with respect to confirmation or in support of your objection to confirmation, Mr. Fulson? I asked you a question, sir, do you have any more questions?

MR. FULSON: No.

THE COURT: Alright. Mr. McClatchey. Any redirect?

MS. UNION: No, Your Honor. Thank you.

THE COURT: Alright, I have a question or two, Mr. McClatchey?

EXAMINATION
BY THE COURT:

Q With respect to Class 2 of the plan which was designated secured claims, are there any secured claimants of this estate?
A No, Your Honor, there are not.
Q Alright, so that's not an accepting or rejecting class, correct?
A No.
Q And so the Michigan entity ... I'm sorry.
A Michigan Consolidated Gas.
Q They would be a Class 3 claimant?
A Yes.
Q Alright, very well. And then with respect to executory contracts, are there any executory contracts that will be rejected pursuant to this plan?
A None that I know of.
Q Alright, so we don't have to worry about the due process concerns or making sure any creditors who are parties to unexpired leases or executory contracts that

were rejected pursuant to the plan receive notice to file their proofs of claim? I understand the plan says that but my practice is, generally, I like a separate notice.

A Understood, Your Honor. There were not parties of executory contracts listed in the debtor's statements and schedules and during my administration I became aware of none.

Q Alright, very well. So the plan provision provides for rejection of all heretofore un-rejected executory contracts as far as you're concerned really won't operate in this case?

A No.

THE COURT: Very well. Ms. Union, did my questions lead to any need for follow-up on your part?

MS. UNION: No. Thank you, Your Honor.

THE COURT: Ms. Bowers?

MS. BOWERS: No, Your Honor.

THE COURT: Mr. Hackett?

MR. HACKETT: No, Your Honor.

THE COURT: Mr. Fulson?

MR. FULSON: No.

THE COURT: Alright, very well. You may step down, Mr. McClatchey.

THE WITNESS: Thank you, Your Honor.

THE COURT: Anything further, Mr. McClatchey?

MR. McCLATCHEY: No, Your Honor. I appreciate the

opportunity to present some evidence here today. As I indicated earlier, we did file a memorandum of law which, I believe, includes an evaluation of all the different confirmation requirements under § 1129. I believe that the standard has been met under 1129(b) and I believe the plan merits confirmation.

THE COURT: Alright, thank you, Mr. McClatchey. Ms. Union, do you wish to make a motion with respect to the trustee's exhibits?

MS. UNION: Yes, Your Honor. I thought I did that when the witness was on the stand but I would move to admit the exhibits.

THE COURT: Well, perhaps I had a lapse there and didn't hear you but in any event, is there an objection to the admission of the trustee's exhibits?

MS. BOWERS: No, Your Honor.

MR. HACKETT: No, Your Honor.

THE COURT: Mr. Fulson?

MR. FULSON: No.

THE COURT: Alright, very well.

MS. UNION: Thank you.

THE COURT: Alright, anything further from the parties?

MR. McCLATCHEY: No. Thank you, Your Honor.

MR. HACKETT: No, Your Honor.

THE COURT: Ms. Bowers?

MS. BOWERS: No, Your Honor.

MR. FULSON: No, Your Honor.

THE COURT: Alright, very well. Then having closely reviewed the liquidating plan and considered the objection filed by Mr. Fulson, the testimony and the exhibits offered by the parties this afternoon, the Court will, upon submission by the trustee, enter an order confirming the trustee's plan of liquidation and overrule the objection to confirmation asserted by Mr. Fulson.

I questioned at the outset whether Mr. Fulson really had standing to object to confirmation. Mr. Fulson is not a creditor or party in interest with respect to the Nicole Energy Services, Inc. case. He is the hundred percent shareholder of Nicole Energy Marketing, Inc. which is the parent of the debtor, the one hundred percent shareholder of Nicole Energy Services. Nicole Energy Marketing, Inc., Nicole Gas Marketing, Nicole Gas Production are all Chapter 7 debtors. And, really, I believe if there were an objection to be asserted on behalf of any of those entities that Mr. Ransier—as the trustee for those entities—would be the appropriate person to do so.

Notwithstanding that fact, I've allowed Mr. Fulson, as I have throughout this proceeding allowed Mr. Fulson, considerable latitude to participate irrespective of whether he technically meets the standing requirements under federal law.

However, again, I think the testimony here has established that the plan meets the confirmation criteria set forth in § 1129(a) and (b) of the Code, that we do have at least one accepting impaired class, actually several accepting impaired classes, we do have a rejecting class, as Mr. McClatchey and Ms. Union pointed out, which is comprised of the interest holders of Nicole Energy Services, Inc. But notwithstanding that fact the Court finds that the plan meets the confirmation criteria set forth in the Bankruptcy Code because under 1129(b), insofar as that rejecting class of interest holders is

concerned, the plan is fair and equitable because no junior class will be taking anything pursuant to the plan. The Court makes the specific finding that this plan was proposed in good faith. The Court makes a further finding that the best interest test has been met in this case and that all other applicable confirmation criteria enumerated in § 1129(a) and 1129(b) have been satisfied.

So for those reasons the Court will, as I stated, enter an order confirming the plan and I ask you to upload that, Mr. McClatchey, when you have an opportunity.

MR. McCLATCHEY: Thank you, Your Honor.

THE COURT: Anything further from the parties?

MR. McCLATCHEY: Could I confer with Ms. Bowers for just one second?

HE COURT: You may.
MR. FULSON: May I ask you a question, Your Honor.

THE COURT: Just one second, Mr. Fulson. You may but ...

MR. McCLATCHEY: Your Honor, I just wanted to clarify before we left the courtroom, Ms. Bowers made a request of the Court on behalf of the Chapter 7 trustee. I agree completely with the statement that nothing concerning the confirmation of this plan or nothing in the plan for that matter hinders, diminishes, enlarges any of the rights of the Chapter 7 Trustee in Mr. Ransier's cases.

She said something about putting a representation to that affect in the order. I don't believe that that probably belongs in the confirmation order but I am stipulating on the record, which she indicated is acceptable to Mr. Ransier, that there's nothing in the confirmation of this plan that is going to affect his cases whatsoever other than insofar as those entities

might have claims against the estate, my estate.

THE COURT: Very well. Ms. Bowers and Mr. Ransier, is that acceptable to you?

MR. RANSIER: That is acceptable. Thank you.

THE COURT: Alright, very well. Mr. Fulson, you had another question?

MR. FULSON: In response to your statement that you wasn't sure that a party in interest has statue in this case.

THE COURT: Standing.

MR. FULSON: Standing in this case.

THE COURT: Yes.

MR. FULSON: If we're not sure or if there is some type of statue, can you share that information?

THE COURT: I was referring to standing which means a right to appear and be heard and object to confirmation.
MR. FULSON: Yes.

THE COURT: And so what I was referring to is the fact that given the fact that you're not a creditor of this estate, I don't view you necessarily to be a party in interest with respect to Nicole Energy Services, Inc. You are the one hundred percent shareholder of the parent of Nicole Energy Services; however, that entity is in Chapter 7. Mr. Ransier is now the legal representative of that entity. And that's why I question whether you have standing. Notwithstanding my concerns about that, I allowed you to participate and I heard your objection and I've overruled it. Are there any other questions?

MR. FULSON: Yes. The Chapter 7 was filed after this proceeding was filed on record so how could the two be put

together?

THE COURT: The two proceedings aren't put together.

MR. FULSON: Well, you just made that statement.

THE COURT: What I'm simply referring to is the fact that at the time your objection to confirmation was filed, or at the time it was heard, in any event, Mr. Ransier is the fiduciary and legal representative of the parent of this debtor and, as such, has the ability to assert any objections on its behalf. But notwithstanding that, I allowed you to go forward and I've overruled your objection, so I think it's really a moot point. Any further questions?

MR. FULSON: No.

THE COURT: Alright. Very well then, we will adjourn for the balance of the day. Thank you.

HEARING CONCLUDED

CERTIFICATE
STATE OF OHIO
SS COUNTY OF CLERMONT

I, Janet Atkins, notary public and court reporter for the State of Ohio, do hereby certify that the foregoing was transcribed by me from an audio recording and that the same is true and correct as transcribed.

I further certify that I am not counsel, attorney, relative or employee of any of the parties hereto or in any way interested in the within action.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal on the 18th day of September, 2009, at Cincinnati, Ohio.

s/s Janet Atkins

My commission expires
January 29, 2011

Janet Atkins